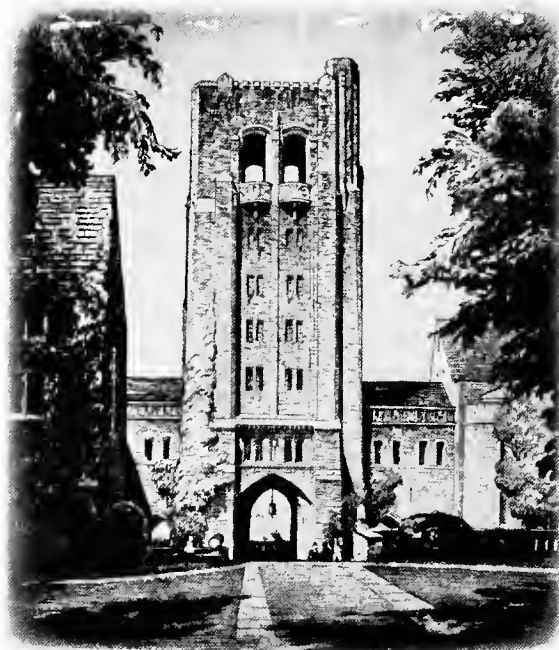


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The science of legal judgment : a treatise



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THE SCIENCE
OF
LEGAL JUDGMENT.

A Treatise

DESIGNED TO SHOW THE MATERIALS WHEREOF,

AND

THE PROCESS BY WHICH,

COURTS CONSTRUCT THEIR JUDGMENTS;

AND

ADAPTED TO PRACTICAL AND GENERAL USE IN THE DISCUSSION
AND DETERMINATION OF QUESTIONS OF LAW.

BY JAMES RAM,
OF THE INNER TEMPLE, BARRISTER AT LAW.

WITH EXTENSIVE ADDITIONS AND ANNOTATIONS,
BY JOHN TOWNSHEND,
OF THE NEW YORK BAR.

NEW YORK :
BAKER, VOORHIS & CO., LAW PUBLISHERS,
66 NASSAU STREET.
1871.

B 43461 (Replac. ment)

Entered, according to Act of Congress, in the year one thousand eight hundred and seventy-one, by
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P R E F A C E .

THE first and only English edition of RAM'S TREATISE ON LEGAL JUDGMENT was published in 1834 ; it has long since been out of print, and copies of it have become very scarce ; while the death of the author precluded the hope of a second edition at his hands.

The book, soon after its publication in England, was reproduced in America in a very unattractive form, as part of the series of "The Law Library."

The work presents those features of painstaking and erudite research which was the peculiar characteristic of all the efforts of its distinguished author ; and it has always stood very high in the estimation of the bench and bar.

The copies in the market were quite inadequate to the demand, and a new edition has long been needed.

The present edition, besides being a literal reprint from the English copy, has incorporated some extensive additions from the English and American reports. These additions, occupying fully one-third of the vol-

ume, are indicated by being inclosed within brackets. Besides the additions to the text, the appendix and index are new.

The Editor, while conscious that he might have done more, confidently believes he has done enough to materially enhance the value of a production which was already so deservedly popular among the best minds of the profession.

NEW YORK, *July*, 1871.

CONTENTS.

CHAPTER I.

INTRODUCTORY	17
------------------------	----

CHAPTER II.

OF THE FOLLOWING MATERIALS OF A JUDGMENT:

1. <i>Certain General Principles of the Law of England,</i>	
2. <i>The Common Law,</i>	
3. <i>Customs of some Cities and Places,</i>	
4. <i>Common Opinion,</i>	
5. <i>Pleadings,</i>	
6. <i>Maxims,</i>	
7. <i>Rules for the interpretation of Acts of Parliament, Deeds,</i> <i>and Wills</i>	33

CHAPTER III.

OF CASES	47
--------------------	----

CHAPTER IV.

OF RULES	27
--------------------	----

CHAPTER V.

OF DICTA EXPRESSED ON THE BENCH	88
---	----

CHAPTER VI.

OF THE FOLLOWING ARGUMENTS :

1. *Convenience, Public Policy, and Inconvenience,*
2. *Analogy,*
3. *A fortiori, that is, a minori ad majus, or a majori ad minus,*
4. *Ex absurdo* 110

CHAPTER VII.

OF PRACTICE 121

CHAPTER VIII.

OF LEX MERCATORIA; THE LAW OR CUSTOM OF MERCHANTS 127

CHAPTER IX.

OF THE CIVIL LAW 133

CHAPTER X.

OF THE CANON LAW 143

CHAPTER XI.

OF THE LAW OF NATIONS 147

CHAPTER XII.

OF CERTAIN TEXT AND OTHER BOOKS 150

CHAPTER XIII.

OF REPORTS 174

CHAPTER XIV.

OF PRECEDENT; CONSISTING OF ONE OR MORE THAN ONE DECISION
IN BANK, OR IN THE HOUSE OF LORDS.

SECTION I. <i>Of Adherence to one Decision</i>	196
II. <i>Of Adherence to two or more Decisions</i>	212
III. <i>Of Departure from one Decision</i>	215
IV. <i>Of Adherence to a Fixed Doctrine</i>	228
V. <i>Of Discordant Decisions, or Series of Decisions</i>	242

CHAPTER XV.

OF DISTINGUISHING A PRESENT CASE FROM A FORMER CASE, OR OUT OF A SETTLED RULE OR DOCTRINE	248
--	-----

CHAPTER XVI.

OF DECIDING ON PARTICULAR CIRCUMSTANCES	256
---	-----

CHAPTER XVII.

OF DECIDING NEW CASES	268
-----------------------	-----

CHAPTER XVIII.

OF ESTIMATING AUTHORITIES.

SECTION I. <i>Of the Comparative Value of Certain Authorities</i>	283
II. <i>Of Circumstances, which may increase the value of an Authority</i>	299
III. <i>Of Circumstances, which may lessen the Value of an Authority,</i>	316

CHAPTER XIX.

OF CERTAIN DUTIES OF A JUDGE, OR COURT . . .	321
SECTION I. <i>Of certain Facts illustrative of Difficulty</i> .	326
II. <i>Of Difficulty in interpreting Instruments</i> .	337
III. <i>Of gaining Information from an Officer of a Court; from Civilians; and from Merchants</i>	344
IV. <i>Of learning the whole Truth of a Case reported</i>	347
V. <i>Of hearing Arguments of Counsel</i> . . .	352
VI. <i>Of obtaining the Opinion of another Judge, or Court</i>	361
VII. <i>Of Bias</i>	376
VIII. <i>Of postponing the Delivery of Judgment</i> .	383
IX. <i>Of looking forward to the Consequences of the Judgment,</i>	394

APPENDIX.

I. ARCHDEACON PALEY'S ACCOUNT OF THE CAUSES OF THE NUMEROUS UNCERTAINTIES AND DIFFICULTIES ARISING IN THE ADMINISTRATION OF JUSTICE . . .	399
II. ESSAY ON JUDICATURE, BY LORD BACON . . .	407
III. ON THE PROPRIETY OF COURTS, AND PARTICULARLY COURTS OF LAST RESORT, ADHERING TO THEIR OWN DECISIONS	413
IV. ON THE MISCHIEVOUS RESULTS OF ABANDONING THE PRINCIPLE "STARE DECISIS."—FROM SHARSWOOD'S LAW LECTURES. LECTURE II	423

THE SCIENCE
OF
LEGAL JUDGMENT...

THE SCIENCE OF LEGAL JUDGMENT.

CHAPTER I.

INTRODUCTORY.

THE subject of the present Treatise leads to the observation, that there are three kinds of legislation, by which the laws of England are made.

One manner of making law is prospective, legislating on facts which it is considered will or may exist, and for which the legislature accordingly provides a written law. The statute law of England is an example of this kind of legislation.

A second manner of making law is prospective and adoptive, legislating on facts which it is considered will or may exist, and for which the legislature therefore provides a written law. This sort of legislation takes place, when any country adopts the laws, or a branch of the laws, of another state. It is known therefore in England, since a part of the Roman civil law is adopted by the Court of Chancery, and the Ecclesiastical and Admiralty Courts, of that country.

A third manner of making law is, to wait for facts that shall occasion a lawsuit; on which facts, when the suit arises, a court of law gives judgment;

a judgment that is constructed of certain materials which are law, and is when delivered part of the law of the land.

Those materials consist of the "divers laws within the realm of England," mentioned by Coke; and of which, among others, he enumerates,—the law of the Crown; the law and custom of Parliament; the law of nature; the common law of England; the statute law; customs reasonable; ecclesiastical or canon law; civil law; the law of merchants.¹ They consist also of the several "fountains or places," from which the same learned writer observes, the "proofs and arguments" of Littleton are drawn;—as, maxims, principles, rules, intendment and reason of the common law; books, records, and other authorities of law; the form of good pleading; approved precedents and use; common opinion of the sages of the law; and the arguments, *ab inconvenienti*; *à majore ad minus*, from the greater to the lesser, or from the lesser to the greater; *à simili*; *à pari*; *ab utili vel inutili*; and *ex absurdo*.²

When, with reference to the Courts of Westminster Hall, it is said, "the judges are to declare the law, not to make the law," "*jus dicere et non jus dare*,"³ the proposition is not, it is apprehended, in all senses, correct. A court, when it constructs a judgment, forms it of certain materials, which are law; those materials the court does not make, and so far the judgment is not creative of law. But the judgment or body, into which the materials are wrought, is law; and is law, although the materials are ill

¹ Co. Litt. 11 b. See also Doct. & 563; 1 Atk. 353; 4 Ves. 332; 4 Bro. St. Dial. i. C. C. 458; 1 Mylne & K. 290, 294;

² Co. Litt. 11 a.

Hale's Hist. Com. L. ch. iv. 6th ed. pp.

³ 7 Durn. & E. 696; 1 Brod. & B.

89, 90; 1 Bl. Com. 69, 70.

chosen, or improperly applied:¹ in some degree, therefore, it would seem, a judgment is creative of law. And this opinion is upheld by the known truth, that so long as a judgment, which a Court of Westminster Hall has delivered, stands unreversed, the case is law, although it is a "shocking decision,"² or is an "extraordinary" case,³ or "has produced considerable mischief," and "ought not to have been decided as it was,"⁴ or even has the effect partly to repeal an Act of Parliament.⁵ And although, while newly in existence, that judgment may be disregarded or set aside,⁶ yet, from probably a variety of reasons, and on one ground in particular, namely, the expediency that the law be fixed or certain,⁷ it may in time become so fast settled, that the Courts of Westminster Hall may not be able to overturn, or even to shake it, and on the contrary may be bound to follow and establish it;⁸ and the force of an Act of Parliament may be required to root it out of the law of the land.⁹

¹ 1 Taunt. 292; 14 Ves. 175; 19 Ves. 479; 4 Burr. 2564, 2565.

² *Morgan v. Surman*, 1 Taunt. 292.

³ *Ex parte Hooper*, 14 Ves. 175; per Mansfield, C. J. in *Doe v. Bliss*, 4 Taunt. 736.

⁴ *Brummell v. McPhearson*, 19 Ves. 479; and see 1 Meriv. 9; 2 Rose, 329.

⁵ "The great operation of the statute De Donis was destroyed by the revival of Common Recoveries." 5 Durn. & E. 179; 7 Durn. & E. 415. The Statute of Frauds, 29 Ch. II, c. 3, s. 3, is in effect repealed by *Russel v. Russel*, 1 Bro. C. C. 269, cited 9 Ves. 117; 19 Ves. 212, 479; 2 Ves. & B. 83; 1 Cox, 212. Certain statutes relative to a bequest of stock are in effect repealed by cases in Chancery; 7 Ves. 440; 15 Ves. 577, 578; 1 Russ. 589, 597, 598. On judges lending their

assistance to repeal an Act of Parliament, by a strict interpretation of it, see *Smith v. Armourers' Comp.* 1 Peake, 199, 201, 3d ed.

⁶ *Emanuel v. Constable*, 3 Russ. 436; *Smith v. Compton*, 3 Barn. & Adol. 189.

⁷ 14 Ves. 425.

⁸ On the doctrine of *Dumpor's case*, 4 Co. 119 b, see 4 Taunt. 736, and 14 Ves. 175. On the doctrine of *Russel v. Russel*, 1 Bro. C. C. 269, see 1 Cox, 212; 9 Ves. 117; 12 Ves. 198; 19 Ves. 212, 479; 1 Meriv. 9; 2 Ves. & B. 83.

⁹ Examples of such Acts of Parliament are—1 Will. IV, ch. 40, on undisposed of Residues of the Effects of Testators, and 1 Will. IV., ch. 46, on Illusory Appointments.

[*Balme v. Hutton*, 2 Tyr. 17, 'overruling many preceding cases, was reversed on writ of error, (9 Bing. 471) the judges rejecting all appeals founded on the glaring hardship of the case, declared that "nothing short of the authority of Parliament itself was sufficient to relax the severity of the former law." Parliament did afterwards¹ alter the law. Again, the decision in *Chisholm, Ex'r. v. Georgia*, 2 Dall. 419, occasioned an amendment of the Constitution of the United States, declaring that the judicial power of the United States should not extend to suits against a State by a citizen of another or a foreign State.²

["One of the rarest qualities of national character is the capacity for applying and working out the law, as such, at the cost of constant miscarriages of abstract justice, without at the same time losing the hope or the wish that law may be conformed to a higher ideal. The Greek intellect, with all its nobility and elasticity, was quite unable to confine itself within the strait waistcoat of a legal formula; and, if we may judge them by the popular courts of Athens, of whose working we possess accurate knowledge, the Greek tribunals exhibited the strongest tendency to confound law and fact. The remains of the orators and the forensic commonplaces preserved by Aristotle in his *Treatise on Rhetoric* show that questions of pure law were constantly argued on every consideration which could possibly influence the mind of the judges. No durable system of jurisprudence could be produced in this way. A community which never hesitated to relax rules of written law whenever they stood in the way of an ideally perfect decision on the facts of particular cases, would only, if it bequeathed

¹ 2 and 3 Vict. ch 9.

² *Flanders' Ch. Justices*, 388.

Handwritten:
Bancroft 1243
2nd ed. 1843

any body of judicial principles to posterity, bequeath one consisting of the ideas of right and wrong which happened to be prevalent at the time. Such jurisprudence would contain no framework to which the more advanced conceptions of subsequent ages could be fitted. It would amount at best to a philosophy, marked with the imperfection of the civilization under which it grew up.”¹]

The circumstance that the Courts of Westminster Hall, through the judgments which they give, exercise in some degree a legislative power, augments the interest and importance, which, as dispensing justice, otherwise belong to those judgments. And a knowledge of the materials of which these judgments are constructed, and of the process used to construct them, appears to be a matter that much concerns both lawyers and the public.

[These materials the court does not make, and so far the judgment is not *creative of* law; but the *judgment or body* into which the materials are wrought is law, and that, though the materials may be ill chosen or improperly applied. It would, therefore, seem that, in some degree, a judgment is creative of law; for, as long as it stands unreversed, the case is law. This has been called by Bentham and others, “judge-made law;” and it is, indeed, difficult to deny that the judges do, in such cases, exercise, and have from the earliest times exercised, in some degree, a species of legislative power.² “It naturally becomes the subject of inquiry,” observes Mr. Spence,³ “how the mere decisions of the *curia regis*, especially on such

¹ Maine's Ancient Law, Am. edit. p. 72.

² Warren's Law Studies, 259, Am. Ed. 1846.

³ Laws of Modern Europe, p. 555.

important matters as changing the course of descent and altering the criminal law, acquired the force of law, in a country where, in theory, the laws can have their force only from the consent of the king, lords, and commons in Parliament assembled. * * * As it would appear the justices of the two benches (King's Bench and Common Pleas) were permitted, by their solemn decisions framed *pro re natâ*, and recorded in their respective courts, not only to declare the law where doubtful, or where no rule before prevailed, but also to *accommodate the law to the altered state of society*, until, by a succession of precedents, a system of law suited to the exigencies of society had been completely established. And, although the principle of *stare decicis*, which is generally acted upon, has long prevented the courts of law from attempting any fundamental alteration in the recorded laws, the process of judicial legislation has not, by any means, ceased in any of the Courts of Westminster Hall."

[It is exceedingly difficult to define the boundary between legislation and judicial interpretation. Sir F. Dwarris¹ seems to admit that judges exercise an authority closely resembling legislation, and refers the origin of such authority to the supineness of the legislature; he says: "When rules of law have been found to work injustice, they have been *evaded* instead of being repealed. Obsolete or unsuitable laws, instead of being removed from the statute book, have been made to bend to modern usages and feelings. Instead of the legislature framing new provisions as occasion has required, it has been left to able judges to invade its province, and arrogate to themselves the

¹ On Statutes, 792 Eng. Ed.

lofty privilege of correcting abuses and introducing improvements. The rules are thus left in the breasts of the judges, instead of being put upon a right footing by legislative enactment." Smith, in the Introduction to his *Mercantile Law*, says, the law in regard to bills of lading originated with Lord Holt, in *Evans v. Martlett*.¹

To judges, (it is advanced with respect,) the knowledge [of the materials of which judgments are constructed, and of the process used to construct them] is important, because it is a guide, which it is their duty to take in forming the judgments which they give; to counsel, the same knowledge is important, because, on questions of law, this knowledge is the only foundation, on which they are able to advise in chambers, or to sustain in court the cause of their client; to attorneys and solicitors, the same knowledge is important, because it is to them that persons, who seek legal advice, first apply for it; often it is the only advice taken or needed; and, on questions of law, this advice must be founded on the knowledge mentioned.

Many materials, of which a judge may construct a judgment which he gives, have already been mentioned and referred to.

Process, which a judge may use to construct a judgment which he gives, depends very much on the nature of the case, in which it is required to deliver that judgment. Such process is the exercise of a variety of duties. A judge's general duties so exercised are: to gather the materials, as facts, law, and authorities, of which to form his judgment; to set on authorities their just value, and to take them as guides

¹ 1 Ld. Raym. 271.

in the formation of his judgment; to hear the arguments of counsel; to contend with difficulties presented by the subject of the suit or by authorities, and, aided by his own knowledge and arguments, and the arguments of counsel, with a single and unbiased mind to deliberate on his judgment; and in so doing to heed the nature of the case, as a case that is new, or that falls within some rule, or is concluded by precedent, or is distinguishable from precedent, or is a case fit to be adjudged on its own particular circumstances only; and, in most instances, to look forward to the consequences of the judgment contemplated.

A chief object at which, in constructing their judgments, the courts attentively look is, certainty in the law; and to cause their judgments to have this effect is their constant and most anxious desire. The language of the court is,¹ "It is better the law should be certain, than that every judge should speculate upon improvements in it."² "The decisions of our predecessors, the judges of former times, ought to be followed and adopted, unless we can see very clearly that they are erroneous, for otherwise there will be no certainty in the administration of the law."³ "It is of great importance in almost every case, but particularly in mercantile law, that a rule once laid down and firmly established, and continued to be acted upon for many years, should not be changed, unless it appears clearly to have been founded upon wrong principles."⁴ "One would always wish that the law were certain upon all subjects, but it is more emphatically important that it should be so in questions

¹ See also 14 Ves. 425; 2 Barn. & Cr. 133; 9 Bing. 285; 1 Clark & Fin. 224; and 2 Burr. 887.

² By Lord Eldon, 8 Ves. 497.

³ By Lord Tenterden, Selby v. Bardons, 3 Barn. & Adol. 17.

⁴ By Lord Tenterden, 7 Barn. & Cr. 476.

concerning real property. The decisions of the law are the great landmarks for the safety and regulation of real property. And perhaps it is of less importance how the law is determined, than that it should be determined and certain; and that such determinations should be adhered to, for then every man may know how the law is.”¹ “Where things are settled, and rendered certain, it will not be so material how, as long as they are so, and that all people know how to act.”² “No matter what the law is, so it be certain.”³ “Certainty is the mother of repose, and therefore the law aims at certainty.”⁴

[“The principle of adopting *precedent* as the guide of judicial decisions, gives stability and vigor to the administration of justice. Speculative wisdom can never devise a code capable of providing for the infinite variety of cases arising out of the transactions of even the most simple state of society. A system of jurisprudence founded on precedent admits the engrafting of other precedents as they arise, and this will form the nearest approach to a perfect code; because, although no two cases are ever *exactly* similar, still no one new case ever happens which has not had a forerunner in some earlier case, so nearly analogous to it as to afford a rational rule to the tribunal.”⁵

[“In our system of judicature, we are bound by precedent and the authority of previous cases, unless they are plainly and manifestly founded upon erroneous principles, and that for the wise purpose of

¹ By Ashhurst, J., *Goodtitle v. Otway*, 7 Durn. & E. 419.

² By Lord Chancellor Parker, *Butler v. Duncomb*, 1 P. W. 452.

³ 2 Ch. Cas. 221.

⁴ By Lord Hardwicke, 1 Dick. 245. On peace being the end of the law, see *Flowd.* 368.

⁵ *Palgrave's Original Antho. of the King's Council*, 9, 10.

securing a reasonable degree of certainty in our judicial proceedings.”¹

[“The science of law,” says Sir James Mackintosh, “is continually struggling to combine inflexible rules with transactions and relations perpetually varying.” “It has been the constant labor of judges, through all changes of society, to keep the common law consistent with *reason* and with *itself*. These two objects have not always been found compatible, and sometimes one has been sacrificed, and sometimes the other. The true idea of the common law seems to be, that of an organized system, having its principle of growth within itself, and of which judges are themselves a part. No new law can ever proceed from them, but *the old is, by their means, in a continual process of development*. Their business, in the most doubtful and unforeseen cases, is still to consider the law as already fixed; to discover and to assert it.”²].

The result of many lawsuits must, it is feared, always remain uncertain; as, for instance, the verdict of a jury, or the interpretation of an instrument, as a deed or will. “This inconvenience belongs to the administration of justice; that the minds of different men will differ upon the result of evidence; which may lead to different decisions upon the same case.”³ “It frequently happens that different persons come to different conclusions from the same premises.”⁴

But the principal cause of uncertainty of the result of a lawsuit ought, perhaps, to be referred to the state of authorities, and their power to bind the courts. Those authorities and that power may be represented, at present, to exist in the following state,

¹ Parke, B., *Garland v. Carlisle*, 2 Crompt. & M. 64.

² 6 Ves. 333, 334.

³ 3 Bing. 247.

⁴ Burton's Elem. Comp. § 7.

productive of much confusion, uncertainty, and inconvenience. [In the appendix, we give Archdeacon Paley's account of the causes of the numerous uncertainties and difficulties arising in the administration of justice.]

1. Modern cases decided in bank stand in opposition to each other; for example, the decision of the Court of King's Bench, in *Binnington v. Wallis*,¹ opposes the decision of the same court in *Gibson v. Dickie*.²

2. Modern cases decided at *nisi prius* stand in opposition to each other; for example, *Bromley v. Wallace*³ opposes *Wyndham v. Lord Wycombe*;⁴ and *Handey v. Henson*⁵ opposes *Towne v. Lady Gresley*.⁶

3. One decision in bank does not always bind the courts to make the same decision in bank on similar circumstances in another case; one such decision is often overruled by another.⁷

4. One decision at *nisi prius* does not bind the courts to make the same decision at *nisi prius* on similar circumstances in another case; often one such decision overrules another.⁸

5. Consequently, one decision at *nisi prius* does not so settle the point decided, as to exclude all hope of a different result on a second *nisi prius* trial of the like question. Hence probably the frequent occurrence of such second trial.⁹

¹ 4 Barn. & Ald. 650.

² 3 Maule & S. 463.

³ 4 Espin. 237.

⁴ 4 Espin. 16.

⁵ 4 Carr. & P. 110.

⁶ 3 Carr. & P. 581.

⁷ *Williams v. Bosanquet*, 1 Brod. & B. 238, 3 Moore, 500, overrules *Eaton v. Jaques*, Dougl. 438, (ed. 1783); and

The King v. Brewers' Comp. 3 Barn. & Cr. 172; 4 Dowl. & Ryl. 492, cited 3 Barn. & Cr. 175, overrules *The King v. Rennett*, 2 Durn. & E. 197.

⁸ *Lewis v. Sapio*, 1 Mood. & Malk. 39, overrules *Powell v. Ford*, 2 Stark. 164.

⁹ 1. *Wyndham v. Lord Wycombe*, and *Bromley v. Wallace*, above:

6. Even two or more cases decided at *nisi prius* do not so settle the point decided as to exclude all hope of a different result on a repeated *nisi prius* trial of the like question. Hence probably the occurrence of such repeated trials.¹

7. One case decided in bank does not so settle the point decided, as to exclude all hope of a different result on a second case in bank on the like question. Hence probably the frequent occurrence of such second case.²

8. Even two or more cases decided in bank do not so settle the point decided, as to exclude all hope of a different result on a repeated case in bank of the like question. Hence probably the occurrence of such repeated case.³

9. A manuscript note of a case is authority.⁴ It may be more full,⁵ or accurate,⁶ than a printed report of the same case. The existence of such manuscript may be little known. When cited by a party in a cause, it may be "almost in point,"⁷ or may have "a very considerable bearing" on a point;⁸ or may be "an authority precisely applicable;"⁹ but the oppo-

2. *Powell v. Ford*, and *Lewis v. Sapio*, above :

3. *Towne v. Lady Gresley*, and *Handey v. Henson*, above.

¹ *Chorley v. Bolcot*, 4 Durn. & E. 317.

² 1. *Cage v. Acton*, 1 Lord Raym. 515; *Milbourn v. Ewart*, 5 Durn. and E. 381.

2. *Wain v. Warlters*, 5 East, 10; *Saunders v. Wakefield*, 4 Barn. and Ald. 595.

3. *Wright v. Wakeford*, 4 Taunt. 213; *Doe v. Peach*, 2 Maule and S. 576.

³ *Wain v. Warlters*, 5 East, 10; *Lyon v. Lamb*, Fell on Guar. 2d ed.

260; *Saunders v. Wakefield*, 4 Barn. and Ald. 595; *Jenkins v. Reynolds*, 3 Brod. and B. 14, 6 Moore, 86.

⁴ Willes, 239; 1 H. Bl. 33, 34; 3 Durn. and E. 94; 9 East, 64, 70; 2 Ves. jun. 600; 4 Ves. 529, 530; 5 Ves. 195, 197, 601; 18 Ves. 347; 1 Sim. 372, 373; 1 Crompt. and Mees. 659; 1 Ball and B. 418, 414.

⁵ Willes, 166; 3 Durn. and E. 94; 5 Maule and S. 20; 2 Ball and B. 233, 574.

⁶ 3 Bos. and P. 652.

⁷ 5 Ves. 601.

⁸ 4 Ves. 529.

⁹ 18 Ves. 347.

site party, or the Court, may never before have heard of it; and it may then come as a great surprise upon both.¹ [Unreported cases were cited by the New York Court of Appeals, in the opinion in *Ryan v. Dox*.² A manuscript opinion of Ch. J. Savage was produced in *Jackson v. Edwards*, 7 Paige, 391. In the decision Vice Chancellor McCoun refers to such MSS. as thus: "I am aware that contrary opinions, entitled to great respect, have been expressed elsewhere, but not judicially." "These unreported cases are always of less authority than one which has been re-reported."³ "I am also informed of manuscript decisions holding a contrary doctrine; it may be that these cases are so explicit on this point that my brethren who have taken part in these decisions may feel bound by them."⁴]

The circumstance that a manuscript note is authority necessarily tends to occasion uncertainty of the result of a lawsuit;—for this reason, that a decision, or judicial opinion, or other authority, on which the prosecution or defence of that suit is fairly grounded, may have been overruled, or in some way affected by an unreported case, which now advances and strikes away the ground on which such prosecution or defence is rested. The same tendency is obviously attributable to a chasm in a series of printed reports, and to irregularity or delay in reporting. In *Corder v. Morgan*, which was a bill for a specific performance of an agreement, the plaintiff relied on *Clay v. Sharpe*, a case which was "not in print," and which he produced from the registrar's book. Sir W. Grant decreed the

¹ *Robinson v. Tonge*, 1 P. W., ed. Cox, 680, n., cited 8 Ves. 383, 384, 388, 390, 394.

² *Redfield, J. Dustin v. Cowdry*; 4 Monthly Law Rep. N. S. 194.

⁴ *Cardwell v. Hicks*, 37 Barb. 466.

³ 34 N. Y. 315.

Also 73 N. Y. 452 (462)

124 N. Y. 536

specific performance according to the prayer of the bill, and expressly made a ground of this decision the unprinted case cited, which, he observed, "is an authority precisely applicable to this case." But his honor said, "he did not think it a case for costs, as the case of *Clay v. Sharpe* was not in print."¹

The system of decision, and in some degree of legislating, which is observable in the judgments of the courts of Westminster Hall, presents, it is certain, many, and some very considerable, imperfections; but, on the whole, it cannot fail to excite much admiration. It is a system that proceeds on sure experience; namely, on facts which from time to time come into existence and occasion lawsuits. It is familiar with old and settled occasions of litigation; and it adapts itself with facility to change and novelty; as, to the increase and improvement of property,² to new species of property,³ to new fraudulent devices,⁴ and to new discoveries of public policy.⁵ And from the same system has sprung a code of law, stamped with the opinions, habits, and transactions of an eminently free, commercial and wealthy people, rich in land, and in the product and credit of commerce; a code which justifies the approval and commendation of Sir M. Hale⁶ and Lord Kenyon,⁷ and which, if it does not arrive at, certainly approaches, the perfect reason, which Sir E. Coke discerns in the law of England. "Reason," this great lawyer observes, "is the life of the law, nay, the common law itself is nothing else but reason; which is to be understood of an artificial perfection of reason, gotten by long study, observation and experience, and

¹ 18 Ves. 344.

² 4 Burr. 2340.

³ 5 Burr. 2592.

⁴ 2 Sch. and Lef. 666.

⁵ 3 Atk. 14, 15.

⁶ Hist. Com. L. ch. iii.

⁷ 7 Durn. and E. 415; 2 Peake Rep. 192.

not of every man's natural reason; for *nemo nascitur artifex*. This legal reason *est summa ratio*. And therefore if all the reason, that is dispersed into so many several heads, were united into one, yet could he not make such a law, as the law in England is; because by many successions of ages it hath been fined and refined by an infinite number of grave and learned men, and by long experience grown to such a perfection for the government of this realm, as the old rule may be justly verified of it, *neminem oportet esse sapientiores legibus*: no man out of his own private reason ought to be wiser than the law, which is the perfection of reason."¹

[The light of principles of universal jurisprudence, bright as it is to those who know how to use it, burns but dimly for the untaught eye. "When a case is submitted for the decision of one unskilled in law, he will generally decide it *according to a confused impression of the whole*, and nevertheless, if of sound sense and decided character, will believe himself very sure of his point. It will, however, be very much a matter of chance whether a second person of like qualities will give the same or the opposite decision."²

["It is neither the province nor the right of a judge to decide any cause on his individual private views. The judicial mind, in which the law is said to repose, is distinct from his personal conscience."³ "I have ever holden all new or private interpretations or opinions which have no ground or warrant out of the reason or rule of our books or former precedents, to be dangerous."⁴

¹ Co. Litt. 97 b; 2 Co. Pref.; Calvin's case, 7 Co. 3 b, 4 a, 18 b, 19 a.

² Bishop's First Book of the Law, s. 91.

³ Von Savigny on Possession, p. 73.

⁴ 7 Co. Pref. Fras. Ed. x.

[“Let us consider the reason of the case. For nothing is law that is not reason.”¹ As to reason being the “life of the law,” Sir William Jones (Jones’ Bailments, Am. ed. of 1807, p. 69, 70) characterizes it as “a maxim in theory excellent, but in practice dangerous: as many rules true in the abstract are false in the concrete. For since the reason of Titus may and frequently does differ from the reason of Septimius, no man who is not a lawyer would in many instances know how to advise unless courts were bound by *authority*, as firmly as the pagan deities were supposed to be bound by the decrees of fate.”

[“This court does not determine questions according to the factitious dictates of a code of honor, or delicacy, but according to settled rules of law and honesty.”² “He had so great a veneration for the law as to suppose nothing to be law which was not founded in common sense and common honesty.”³ “Common sense still lingers in Westminster Hall.”⁴ The court in one case gave as a reason for following a prior decision, that it was “founded on good sense and sound law.”⁵]

¹ Powell, J. *Coggs v. Bernard*, 2 Ld. Raym. 909, 911.

² *Taylor v. McRae*, 3 Richardson’s Eq. R. 105.

³ 2 Yeates’ Rep. 502, citing 3 T. R. 62, 162.

⁴ *Cross v. Seaman*, 11 Com. Bench R. 524; per Maule, J.

⁵ *Allen v. Carter*, 5 Law Rep. 424 C. P.

CHAPTER II.

OF THE FOLLOWING MATERIALS OF A JUDGMENT :¹

1. Certain General Principles of the Law of England.
2. The Common Law.
3. Customs of some Cities and Places.
4. Common Opinion.
5. Pleadings.
6. Maxims.
7. Rules for the interpretation of Acts of Parliament, Deeds, and Wills.

1. THESE general principles of the law of England are materials of a judgment :—

The law of nature;² the revealed law of God;³ Christianity;⁴ morality and religion;⁵ common sense;⁶ legal reason;⁷ justice;⁸ natural justice;⁹ natural equity;¹⁰ humanity.¹¹

[In the United States, the “materials of a judgment are, (1.) the Constitution of the United States and the laws and treaties of the United States made in pursuance of it; (2.) the constitution of the State;

¹ As a judgment may be constructed of any or either of the “divers laws within the realm of England,” see an enumeration of these laws in Co. Litt. 11 b; and see *ibid*, 11 a, an enumeration of several “fountains or places” from which Littleton has drawn his proofs and arguments.

² Calvin's Case, 7 Co. 4 b, 12 b, 14 b; Hob. 87, 224, 225; 4 Burr. 2343; 2 Barn. & Cr. 471; Doct. & St. Dial. I, ch. ii & v; 1 Bl. Com. Introd. s. 2; Fortescue de Land. ch. xvi, and n., ed. Amos.

³ 2 Barn. & Cr. 471; Doct. & St. Dial. I, ch. iii & vi; 1 Bl. Com. Introd. s. 2.

⁴ Willes, 548; 4 Bing. 641.

⁵ 3 Bing. 131.

⁶ 6 Durn. & E. 669; 1 East, 208.

⁷ Litt. s. 138; Co. Litt. 97 b; Calvin's case, 7 Co. 3 b, 4 a, 18 b, 19 a.

⁸ 5 Bing. 169; 4 Burr. 2312.

⁹ 1 Atk. 46.

¹⁰ Hob. 224.

¹¹ 3 Barn. & Ald. 319; 4 Bing. 641, 643.

(3.) the reported cases in the State courts; (4.) the law of nature, morality and religion, common sense, legal reason, and whatever else goes to establish the great principles of universal justice; (5.) the common law and usages of the country, and (6.) the laws and decisions of other states and countries consistent with our own laws and institutions.”]¹

“The law of nature is that, which God at the time of creation of the nature of man infused into his heart, for his preservation and direction; and this is *lex æterna*, the moral law, called also the law of nature.”²

[In Year Book, 13 Edw. IV, fol. 9, case 5, the chancellor of England, said the case must be determined according to the law of nature. This is supposed to be the earliest recorded recognition by the English Court of Chancery of the law of nature. In the old abridgments, chancery law is found under the title “Conscience.”

[Lord Campbell³ gives a judgment of Lord Chancellor Morton’s.⁴ Two persons being appointed executors, one of them released a debt due the testator without the assent of his co-executor, who filed a bill in Chancery suggesting, that on this account the will could not be performed, and praying relief against the other executor and the debtor to whom the release was granted. Objection was made that there was no ground for interference, as one executor, by the common law, may release a debt. Archbishop Morton, Lord Chancellor: “It is against reason that one executor should have all the goods, and give a release by himself. I know very well that every law should be

¹ Powell’s Analysis, Bk. III, ch. xi, p. 396.

² Calvin’s Case, 7 Co. 12 b.

³ 1 Lives of the Chanc. ch. xxvi.

⁴ Year Book, 4 Henry VII, 4 b, A. D. 1489.

consistent with the law of God; and that law forbids that an executor should indulge any disposition he may have to waste the goods of the testator; and if he does, and does not make amends, if he is able, he shall be damned in hell." Lord Campbell adds, "Equity decisions at this time depended upon each chancellor's peculiar notions of the law of God and the manner in which heaven would visit the defendant for the acts complained of in the bill; and though a rule is sometimes laid down as to where "a subpoena will lie," that is to say, where there might be relief in Chancery, it was not until long after that, authorities were cited by chancellors, or that there was any steady reference by them to the doctrine of the court."]

"The proceedings in our courts are founded upon the law of England, and that law is again founded upon the law of nature, and the revealed law of God. If the right sought to be enforced is inconsistent with either of these, the English Municipal Courts cannot recognize it:"¹ "Reason is the life of the law, nay the common law itself is nothing else but reason; which is to be understood of an artificial perfection of reason, gotten by long study, observation and experience, and not of every man's natural reason; for *nemo nascitur artifex*. This legal reason *est summa ratio*;"² "one rule can never vary, *viz.*, the eternal rule of natural justice:"³ "As far as human means can go, it is the object of English law to uphold humanity, and the sanctions of Religion."⁴

2. A second material of a judgment is the common law, which is an unwritten law that confers rights

¹ By Best, J., 2 Barn. & Cr. 471.

³ By Lee, C. J., 1 Atk. 46.

² Co. Litt. 97 b; Calvin's Case, 7

⁴ By Best, C. J., 4 Bing. 643.

Co. 3 b, 18 b, 19 a.

common to all;¹ of which common law, a part, and probably the most part, is a general usage, custom or practice,² designated "a general usage of the realm;"³ or "a general immemorial practice through the realm;"⁴ or "the general customs of the whole kingdom;"⁵ or "the universal and immemorial usage throughout the country."⁶

["When our ancestors," says Mr. Bishop, "came to the wilderness which constituted this country at the time of its settlement, they found no law here; for, supposing the Indians to have had law in the sense in which the word is understood among a civilized people, still the Indians retired when our ancestors came, so that the country must have been then regarded as uninhabited."⁷ Therefore the established doctrine of our courts is, that our ancestors conveyed hither the entire body of the English law, as it was when they emigrated, only they did not need, and so did not bring, any laws which were inapplicable to their altered situation and circumstances. They brought not merely the principles administered in the common law courts, technically so called, but in all the other tribunals; as the equity, admiralty, and ecclesiastical. It is evident, however, that many of the statutes, being of a local nature or unadapted to our circumstances, and such principles of the common law as were found contrary

¹ Co. Litt. 115 b, 142 a; Termes de la Ley, v. Common Ley; Hale's Hist. Com. L. ch. ii; 1 Bl. Com. Introd. s. 3; Finch's L. Book II, ch. i; 2 Wils. 348, 351; 4 Burr. 2312, 2343.

² Doct. & St. Dial. I, ch. vii; Co. Litt. 110 b, 115 b; Hale's Hist. Com. L. ch. ii; 1 Bl. Com. Introd. s. 3; Plowd. 195; 4 Burr. 2368.

³ 5 Barn. & Ald. 301.

⁴ 5 Barn. & Ald. 279.

⁵ Hob. 87.

⁶ 3 Durn. & E. 261, 263; 5 Barn. & Ald. 279, 300.

⁷ Bishop's First Book of the Law § 51. See Alexander's Collection of British Statutes in force in Maryland

to reason, were excepted out of the mass of English laws brought hither by our ancestors; but general statutes, amendatory therefore of the common law, came; and they constitute a part of our common law.

[The words "Common Law" have not everywhere the same meaning. In Scotland, they mean "the Roman Law, either by itself or in conjunction with the Canon Law."¹ In the United States, "the Common Law includes those principles, usages and rules of action applicable to the government and security of person and property, which do not rest for their authority upon any express and positive declaration of the will of the Legislature."²

[Although "we did not import from the mother country any of the special customs which, in particular localities, are allowed to supersede the common law,"³ the several States have, to some extent, local customs and usages which have grown up with the earlier settlements, and incorporated themselves into the mass of their common law.⁴

[We have sometimes adopted part of an English statute, and rejected the residue.⁵ The early English statutes regulating the price of labor were never in force in this country.⁶ So the English statutes, 13 Edw. I, ch. xli; 5 Geo. III, ch. xvii, and other statutes restraining the disposition by religious corporations of their real estate, were never in force in the State of New York.⁷

¹ 1 Ersk. Just. 1, 28.

² 1 Kent's Com. 472.

³ *Winder v. Blake*, 4 Jones' N. C. 336.

⁴ *Commonwealth v. Chapman*, 13 Met. 68.

⁵ Report of the Judges, 3 Binn. 595;

Updegraph v. Commonwealth, 11 S. & R. 394.

⁶ *Master Stevedores' Asso. v. Walsh*, 2 Daly, 7.

⁷ *Madison Ave. Ch. v. Baptist Ch.*, 1 Swe. 122.

[This country has not adopted the English rules as regards the effect of a sale in market overt,¹ nor as to ancient lights,² nor as to navigable rivers.³

[In some of the older States, a few of the English statutes, passed subsequently to the settlement of those States, were adopted, and thus made of force by the general consent.⁴ But unless so adopted, or expressly made applicable, no such statutes bound the colonies, except such as affected the king's prerogative.⁵

[It is a moot point how far the common law controls statutes. Lord Chancellor Ellesmere, in his speech on swearing in Sir Henry Montague, as successor to Lord Coke, referring to the grandfather of Sir Henry, and contrasting him with Coke, said, "*He* (Sir Henry's ancestor) challenged not powers from this court * * nor to have power to judge statutes void if he considered them to be against common right and reason." Upon which Lord Campbell, in his "*Lives of the Chancellors*" (vol. II, p. 375), observes: "This is Ellesmere's best hit, for Coke had written such nonsense (still quoted by silly people) as 'that in many cases the common law shall control acts of Parliament, and sometimes shall judge them to be merely void; for where an act of Parliament is against common right and reason, the law shall control it and make it void.'⁶ When questioned for this doctrine before the council, he was so absurd as to defend it, and gave as an example 'that if an act of Parliament were to give the lord of a manor conusance of all pleas arising

¹ *Hosack v. Weaver*, 1 Yeates, 479.

² *Brown v. Scofield*, 8 Barb. 239; *Morgan v. King*, 18 Barb. 287.

³ *Myers v. Grinnell*, 10 Barb. 537; and see *Dubois v. Kelly*, 10 Barb. 496.

⁴ *Com'wealth v. Chapman*, 13 Met.

68.

⁵ *Com'wealth*, 2 Ashm. 63; *Bull v. Loveland*, 10 Pick. 13; *McKinneror v. Bliss*, 31 Barb. 180. See further, *Bishop's First Book of the Law*, § 58

⁶ *Bonham's Case*, 8 Rep.

within his manor, yet he shall hold no pleas whereunto himself is a party for *iniquum est aliquem suæ rei esse judicium*,' thus proceeding on the *construction*, not the repeal by the court." On the other hand, Mr. Bishop, in his First Book of the Law,¹ says it has been laid down generally, that, "statutes passed against the plain and obvious principles of common right and common reason, are absolutely null and void, *as [so] far as they are calculated to operate against those principles*;" and he adds: "This doctrine commends itself, moreover, by a considerable weight of English, as well as of American judicial authority."]

3. A third material of a judgment is, the customs of "some cities and places;"² as, a "hamlet, town, burgh, city, manor, honour, hundred or county."³

[Custom and usages are to be considered in construing statutes.⁴ We did not import any of the special customs which, in particular localities in the mother country, are allowed to supersede the common law.⁵ Several States have, to some extent, local customs and usages, which have become common law.⁶ But it has been held, there can be no custom with us, the effect of which is to supersede the common law.⁷]

4. Sir E. Coke expressly says, that common opin-

¹ Book II, ch. ix, § 90.

² Hob. 225; 4 Burr. 2368; Litt. s. 165; Co. Litt. 110 b, 115 b; Doct. & St. Dial, I, ch. x; Hale's Hist. Com. L. ch. ii, 1 Bl. Com. Introd. s. 3; the case of Tanistry, Davys' Rep. 28 b.

³ Co. Litt. 110 b; Doct. & St. Dial. I, ch. x.

⁴ Merriam v. Harson, 2 Barb. Ch. 232. B'k of Utica v. Mersereau, 3 id. 528; 577; Fort v. Burch, 6 Barb. 60, 73.

⁵ Winder v. Blake, 4 Jones' N. C.

332, 336. See ch. vi. of Bishop's First Book of the Law, entitled "How our unwritten law has come to us."

⁶ Com'wealth v. Chapman, 13 Met 68; Clark v. Foxcroft, 6 Greenl. 296; McConico v. Singleton, 2 Mill, 244; Broughton v. Singleton, 2 Nott & McCord, 338; but see The State v. Parker, 1 D. Chip. 298.

⁷ Winder v. Blake, 4 Jones' N. C. 332; Knowles v. Dow, 2 Fost. N. H. 387.

ion, *communis opinio*, is of good authority in law;¹ and he is, it appears, supported by Littleton.² And a modern case may be referred to, in which "the universally received opinion of the profession" was a ground of the decision.³ "Great attention," it is observed by Sir T. Plumer, "is certainly due to the prevailing opinions of the profession on any point. If however, the point has never been settled by express decision, it is the duty of the judge before whom the question is brought, to exercise his own unbiassed judgment upon it, with all the deference and caution which ought to be expected from him, before he relies upon his own opinion, when opposed to that of the generality of the profession: but with a sense of the responsibility which his functions impose upon him of tracing the subject to principles and analogous authorities, and of endeavoring to come to a correct decision. It is possible that opinions may occasionally be afloat, founded on loose expressions and scattered dicta, sometimes uttered without mature consideration sometimes inaccurately or imperfectly reported, which pass from one to another, and are gradually received and acted upon as forming the law, without sufficient authority for such a conclusion."⁴

Mr. Justice Aston has remarked, with reference to a long uniform idea of a particular object of property—"Though there is no precise decision in the point yet this long uniform idea of such an object of property at law deserves the greatest attention and weight where every principle of reason and justice concur with deciding in favour of the property."⁵

¹ Co. Litt. 186 a, 364 b, 365 a.

⁴ 1 Russ. 63.

² Litt. s. 288, 697.

⁵ 4 Burr. 2347.

³ Grant v. Gunner, 1 Taunt. 448.

5. Littleton having mentioned a matter, which "is proved by the pleading," Sir Edward Coke's comment on this is,—“Note, one of the best arguments or proofs in law is drawn from the right entries or course of pleading; for the law itself speaketh by good pleading; and therefore Littleton here saith, it is proved by the pleading, &c., as if pleading were *ipsius legis viva vox*.”¹ And Chief Justice Holt says, “Pleading, though it does not make the law, yet is good evidence of the law, because it is made conformable to it.”² The like opinion is expressed by Mr. Baron Hullock, who says that pleading is “the best evidence of the law.”³ And Abbott, C. J., adducing the form of the Writ of Extent in proof of the existence of a rule, observes, “Better evidence of the law we cannot expect.”⁴ In a case, which was “the first action of the kind,” Ashhurst, J., had recourse to “the books of entries and the returns of writs,” “which are,” he said, the best authorities in the absence of decided cases.”⁵ And Lord Kenyon, relying on “the very form of proceedings,” as evincing a certain distinction, concludes—“This shows the distinction beyond all doubt, and is of greater authority, than even adjudged cases, because the writs and records form the law of the land.”⁶

A form or precedent of pleading was a ground of decision in *Radcliffe v. D'Oyly*, where the question was, whether an action on the case would lie against a prebendary for dilapidations. And Ashhurst, J., said—“The form of declarations in these kinds of actions is very material in a case where no direct determinations can be found one way or the other; for the form

¹ Litt. s. 170; Co. Litt. 115 b.

² 1 Lord Raym. 522.

³ 3 Bing. 541.

⁴ 2 Barn. & Ald. 610.

⁵ 2 Durn. & E. 10, and see 3 Robt. 365.

⁶ 4 Durn. & E. 648.

of legal proceedings is evidence of what the law is. And we find the form to be in this case, that all prebendaries, rectors, vicars, &c., are bound by law to keep their houses in repair." And, to the same effect Buller, J.,—"The first question is, whether there be any distinction in point of law between a prebendar and any other ecclesiastical person, as to his liability in this sort of action. I am clearly of opinion that there is not. The two cases cited from Lutwyche are very material; for precedents, which have prevailed for a century past, are strong to show what the common law is; and in those it is stated that prebendaries, as well as rectors, &c., are bound by law to repair."¹

[“Forms so lightly decried occupy,” says M. Simon, “in the science of law, the same place as the formulas framed to facilitate the solution of problems occupy in mathematics.” And Chief Justice Kent, in *Warren v. Lynch*,² says: “Forms will frequently, and especially when they are consecrated by time and usage, become substance.” Again, in *The People v. Fisher*,³ the court says: “Precedents [forms], in the absence of adjudications, are some evidence of what the law is.” In *Jackson v. Gumeer*,⁴ Chief Justice Savage observes: “The form used in this case has been in very general use, and the practice in this respect may, perhaps amount to a construction of the act.” In *Sherwin v. Shakespeare*,⁵ the court is reported to have held: “The forms of the decrees of the court (which are the best exponents of the law, have long existed, and have worked through all difficulties, and proved effectual

¹ 2 Durn. & E. 630, cited 8 Bing.

531.

² 5 Johns. 245.

³ 14 Wend. 9.

⁴ 2 Cow. 552.

⁵ 27 Eng. L. & Eq. R. 358.

for the purposes of justice), ought not to be departed from, added to, or altered, unless in cases of special necessity." A precedent in Chitty on the rule that the note of the debtor extinguishes the debt was repudiated by the courts of New York.^{1]}

6. A part of the law of England consists of Maxims.² They are principles of the law.³ A maxim is often called a principle;⁴ and, says Sir E. Coke, "it is all one with a rule, a common ground, postulatium, or an axiom, and it were too much curiosity to make nice distinctions between them."⁵ And he elsewhere says, "A maxim is a proposition, to be of all men confessed and granted, without proof, argument, or discourse."⁶ The author of "Doctor and Student," in naming maxims as a ground of the law, observes that this ground "standeth in divers principles, that be called in the

¹ Hughes v. Wheeler, 8 Cow. 77; and see Waydell v. Luer, 5 Hill, 451.

² Litt. s. 3, 90; Co. Litt. 11 a. Generally on these maxims, see Doct. & St. Dial. I, ch. viii & ix; Fortescue de Land. ch. viii; Doderidge's English Lawyer; Wingate's Maxims of Reason, or the reason of the Common Law of England; Francis' Maxims of Equity; and the work called Grounds and Rudiments of Law and Equity. Lord Bacon's tract, entitled The Elements of the Common Laws of England, contains "A Collection of some Principal Rules and Maxims of the Common Law, with their latitude and extent."

The reader may also be referred to the Index of Maxims subjoined to Coke's 2d Institute. And it may not be unimportant to mention, that Mr. Justice Chambre possessed a very large collection of Maxims. 5 Taunt. 159.

Best, C. J., speaking of the improvement which, in the time of Henry

III, was made in the law, by incorporating much of the Civil Law with the Common Law, observes, "We know that many of the maxims of the common law are borrowed from the civil law, and are still quoted in the language of the civil law. Notwithstanding the clamour raised by our ancestors for the restoration of the laws of Edward the Confessor, I believe that these, and all the Norman customs which followed, would not have been sufficient to form a system of law sufficient for the state of society in the time of Henry III. Both courts of justice, and law writers, were obliged to adopt such of the rules of the Digest, as were not inconsistent with our principles of jurisprudence." 5 Bing. 167.

³ Co. Litt. 11 a, 67 a, 343 a.

⁴ Litt. s. 648; Co. Litt. 11 a, 343 a.

⁵ Co. Litt. 11 a.

⁶ Co. Litt. 67 a, 343 a.

law maxims, the which have always been taken for law in this realm, so that it is not lawful for any that is learned to deny them; for every one of those maxims is sufficient authority to himself. . . . An such maxims be not only holden for law, but also other cases like unto them, and all things that necessarily follow upon the same, are to be reduced to the like law; and therefore most commonly there be assigned some reasons or considerations why such maxims be reasonable, to the intent that other cases like may the more conveniently be applied to them.”¹

Like cases are accordingly very commonly applied to maxims; they being frequently used in the formation of a judgment, which a judge or court deliver. Some, which readily occur for the purpose of examples, are,—*Modus et conventio vincunt legem*:² *verba chartarum fortius accipiuntur contra proferentem*. *expressum facit cessare tacitum*:⁴ *benignæ faciendæ sunt interpretationes chartarum, ut res magis valeat quam pereat*:⁵ *verba intentioni et non e contrà debent inservire*:⁶ *quisque potest renunciare juri pro se introducto*:⁷ *omnis ratihabitio retro, trahitur et mandata æquiparatur*:⁸ *ignorantia juris non excusat*:⁹ *in pari delicto potior est conditio defendentis*:¹⁰ *volenti non fit injuria*:¹¹ *sic utere tuo, ut alienum non lædas*:¹² *quancumque aliquid prohibetur ex directo, prohibetur et per obliquum*:¹³ *actus Dei nemini facit injuriam*:¹⁴ the la-

¹ Doct. & St. Dial. I, ch. viii.

² 1 Lord Raym. 517; 8 Durn. & E. 605; 4 Taunt. 131.

³ 13 East, 87.

⁴ 4 Taunt. 330; 4 Moore & P. 8.

⁵ Willes, 332; 2 Younge & Jerv. 618; 14 East, 248.

⁶ Willes, 332; 2 Younge & J. 618.

⁷ 3 Bos. & P. 643.

⁸ 9 East, 281; 3 Barn. & Ald. 61.

⁹ Dougl. 454, ed. 1783; 5 Taunt. 153, 158.

¹⁰ Dougl. 454, ed. 1783; 5 Taunt. 159.

¹¹ 5 Taunt. 162; Cas. T. Talb. 40.

¹² 7 Taunt. 498, 499, 522, 529.

¹³ 7 Taunt. 507.

¹⁴ 3 Bing. 375.

will not work a wrong:¹ *actio personalis moritur cum persona*:² *leges posteriores priores contrarias abrogant*.³

[*Maxims*, or legal maxims, are not to be received as *axioms*. We believe that not a single law maxim can be pointed out which is not obnoxious to objection. The old law maxims must be put aside or forgotten, or remembered only as things of the past and dead, even as we have put aside and forgotten maxims in science, supplying their places with maxims drawn from a larger experience and more philosophical analysis. "Perhaps there is a period in every system of law previous to which the formation of maxims will be productive of bad effects, as leading to the establishment of principles which it is not permitted to controvert, but which more enlightened views would repudiate."⁴ The benefit which science has received from the use of maxims is of a questionable nature, and the adoption of these is of a questionable nature whenever the ideas are confused.⁵ In *Bonomi v. Backhouse*,⁶ Erle, J., says: "The maxim *sic utere tuo ut alienum non lædas* is mere verbiage. A party may damage the property of another where the law permits; and he may not, where the law prohibits; so that the maxim can never be applied until the law is ascertained; and when it is, the maxim is superfluous." And in *Jenkins v. Wheeler*,⁷ the court held that the maxim, "Freight is the mother of wages," is not universally true.]

¹ 1 Lord Raym. 517; 5 Durn. & E. 385; *Actus legis nemini est damnosus*, 2 Inst. 287.

² 2 Maule & S. 415.

³ 1 Bos. & P. N. Rep. 7; 1 Maule & S. 597.

⁴ Fortesque de laudibus, &c., ch. viii, note to edition by Amos; see

Doderidge's English lawyer; Doctor and Student, Dial. I, ch. viii. ix.; Bacon's Preface to his Maxims.

⁵ Locke on the Understanding, Bk. IV, ch. vii.

⁶ 27 Law Jour. N. S. 388, Q. B.

⁷ 4 Robertson, 575.

7. Rules for the interpretation of Acts of Parliament, deeds, and wills, occupy a conspicuous place among the materials out of, or instruments by, which are formed the judgments, which a judge or court delivers.

The number, however, of those rules manifests the propriety of excluding from this treatise a particular enumeration or account of them; especially as those rules do not exist in a dispersed state only, but have already been collected into a body by the labor and diligence of several compilers.

The reader is, therefore, referred on the interpretation—

1. Of Acts of Parliament [statutes and constitutions], to Comyns' Digest, tit. Parliament; Viner's Abridgment, tit. Statutes; Bacon's Abr. tit. Statute; Coke's 2 Inst., Index v. Statutes; and Dwarries' Treatise on Statutes, vol. II. [Sedgwick on Statutory and Constitutional Law; Smith on Statute and Constitutional Law; Cooley on Constitutional Limitation; Paschall on the Constitution; Story on the Constitution.]

2. Of Deeds, to Comyns' Dig. tit. Fait; Viner's Abr. tit. Deeds, Faits, Grants; Sheppard's Touchstone, chap. v. ed. Hilliard and Preston; Cruise's Dig. tit. Deed, chap. xix; Bacon's Abr. tit. Grants.

3. Of Wills, to Comyns' Dig. tit. Devise; Viner's Abr. tit. Devise; Sheppard's Touchst. chap. xxiii. ed. Hilliard and Preston; Cruise's Dig. tit. Devise, chap. ix; Bacon's Abr. tit. Wills. [Hawkins on the Construction of Wills, and Wigram on Extrinsic Evidence in Construction of Wills. The latter work is highly esteemed, and is designated by Mr. Justice Miller, in *Grant v. Grant*,¹ as an "excellent treatise."]

¹ Law Rep. vol. V, 727, C. P.

CHAPTER III.

OF CASES.

AMONG the principal authorities in law are decided cases,¹ namely, cases decided by the House of Lords, or by a Court of Westminster Hall sitting in bank,² or at *nisi prius*.³ These different decisions, however, do not bear the same value; and the value of either kind may be augmented or lessened by circumstances. Their comparative, and increased or diminished, value it is proposed to discuss in a separate chapter. And in a distinct chapter will also be considered the binding force of them as precedents. ["English jurisprudence," says Edmund Burke,⁴ "has not any other sure foundation; nor, consequently, have the lives and properties of the subject any sure hold, but in the maxims, rules, and principles, and juridically traditional line of decisions contained in the notes taken, and from time to time published, mostly under the sanction of the judges, called reports." "The judges of Westminster Hall have been, and continue to be, the venerable architects of the fabric of the Common Law."⁵

["The decisions of courts are not the law, they are only evidence of the law."⁶ And in overruling a decision, the courts declare, not that the decision is "*bad law*," but that it was not law at all. But the expression that an erroneous decision is "*bad law*" is

¹ 5 Barn. & Ald. 480; 3 Barn. & Adol. 17; 1 Crompt. & Mees. 322.

² 5 Durn. & E. 385.

³ 5 Durn. & E. 117; 1 Dick. 230.

⁴ Burke's Works, vol. XIV, p. 332.

⁵ Burton El. Comp. § 7.

⁶ Senator Platt, *Yates v. Lansing*,

9 Johns. 415.

frequently used, as by Mr. Justice Patteson, in *Balme v. Hutton*,¹ where he says, "The decision in *Lechmere v. Toplady*, 3 Mod. 326, is plainly bad law."]

Separate chapters are likewise allotted to the subjects of New Cases, and Distinctions between Cases. The observations that will here be made will, accordingly, be confined to other matters. And these varieties of subjects will, perhaps, be thought to deserve peculiar attention, when it is remembered that "the judgments of the Courts of Westminster Hall are the only authority that we have for by far the greatest part of the law of England."² [The law is made up of decided cases."³]

A case is authority, although not decided by a full court, that is, by all the judges of the court;⁴ as if a judge, although he is the chief justice,⁵ is absent, or declines to give an opinion,⁶ or even in the opinion, which he expresses, differs from the rest of the court.⁷

["Several of the judges placed their decision upon other and different grounds than the failure to give the necessary signals, and I do not understand that a majority of the court held that such neglect was an assurance of safety, which relieved the wayfarer, who did not look, from the imputation of negligence."⁸ In the absence of any evidence to the contrary, it must be assumed that judges who unite in a judgment

¹ 9 Bing. 476.

² By Best, C. J., *Fletcher v. Soudes*, 3 Bing. 588.

³ The Ld. Chanc., *Lewis v. Bridgman*, 2 Cl. & Fin. 747.

⁴ Wilmot's Notes, 265.

⁵ *Cage v. Acton*, 1 Lord Raym. 515, cited 5 Durn. and E. 384, 385; *The King v. Russell*, 6 Barn. and Cr.

566, 9 Dowl. and Ryl. 566, cited 4 Barn. and Adol. 38; *Selby v. Bardons*, 3 Barn. and Adol. 2, 20.

⁶ *Atkins v. Drake*, 1 M'Clel. & Y. 237.

⁷ *Cage v. Acton*, *The King v. Russell*, and *Selby v. Bardons*, above.

⁸ *Wilcox v. Rome, &c. R. R. Co.*, 39 N. Y. 363.

act upon the grounds stated by those judges whose reasons are assigned, and with whom they agree on the judgment to be rendered."¹]

On a late occasion, where in the Court of King's Bench, counsel on citing a case observed, that "perhaps that case must not be altogether relied upon, as the Lord Chief Justice differed in opinion from the other judges," Lord Tenterden interposed and expressly stated, "It has the authority of a decision of this court."² It very frequently happens, that a judge declines to give any opinion, for these reasons,—that he was absent when the case was argued;³ that he was while at the bar counsel in the cause;⁴ that he is connected with one of the parties.⁵

When the judges of a court, who deliver their opinions, are in opinion equally divided, there is no judgment:⁶ the matter depends undecided;⁷ no decision that can be relied on as authority is come to.⁸ [The New York Code of Procedure provides, § 14, that, if a majority of the court do not concur the case is to be reheard, and if on the second rehearing a majority do not concur, the judgment shall be affirmed. This provision, it is said, is merely declaratory of the common law rule.⁹ A judgment of affirmance in the

¹ Oakley v. Aspinwall, 13 N. Y. 504.

² 4 Barn. and Adol. 38.

³ 5 Durn. and E. 267, 381; 1 Taunt. 299; 1 M'Clel. and Y. 237.

⁴ 3 East, 245, 393; 1 Barn. and Adol. 615; 2 Barn. and Adol. 385, 445.

⁵ 5 Durn. and E. 5; 5 Maule and S. 21.

⁶ Palm. 257; M'Clel. 308; 1 M'Clel. and Y. 245. See the suggestion of

Burrough, J., in such a case, 7 Taunt. 507, 508, 536.

⁷ 4 Co. Pref. xvii. To prevent this impediment to justice, James I added a fifth judge to each of the Courts, King's Bench and Common Pleas. Ibid.

⁸ 14 East, 621; 3 Durn. and E. 631.

⁹ Mason v. Jones, 3 N. Y. 375; Goddard v. Coffin, Davies' U. S. Rep. 381.

absence of dissent, is an affirmance of the precise proposition decided in the court below.¹ An affirmance upon an equal division of the court merely determines the particular case, and leaves the questions involved in it, open for consideration in any future case in which they may arise.² When the judges differ in opinion, the decision depends upon the majority in number without any regard to seniority. In *Selby v. Bardons*,³ the two puisne justices then but recently appointed overruled the opinion of their Chief, the Lord Tenterden. Where judgment is pronounced in open court without any dissent at the time, neither party can attack the judgment on the ground of what may have taken place among the judges in private.⁴ In England where a court of four judges is equally divided in opinion, it is usual for the junior justice to withdraw his judgment.⁵ But this practice is not always followed.]

In *Atkins v. Drake*, in the Court of Exchequer, Hullock, B., differed in opinion from Alexander, C. B., and Graham, B.; and Garrow, B., declined giving any opinion, in consequence of having been absent from part of the discussion of the case. The result of the opinion of the majority of the court was, that a rule, to show cause why a new trial should not be had, was discharged. Counsel afterwards applied at the sittings before the four barons, that the rule might be re-argued for the purpose of having the opinion of the whole court; on the grounds,—of the importance of the case generally, and more particularly with

¹ *Green v. Clark*, 13 Barb. 57.

² *Moorse v. Goold*, 11 N. Y. 281;
The People v. The Mayor of N. Y.,
25 Wend. 252.

³ 3 Barn. and Adol. 2.

⁴ *Mason v. Jones*, 3 N. Y. 375;
Oakley v. Aspinwall, id. 547.

⁵ *Cockle v. L. & S. E. Railway Co.*,
Law Rep. C. P. vol. V, p. 472.

reference to costs,—that the suitors had a right to ask for the opinion of all the judges,—and that in the event of a new argument before the full court, and an equal division of opinion in the barons, the Chancellor of the Exchequer might be called in to turn the scale. But they admitted, they were not aware of any precedent for the application, and did not mention any for calling in the Chancellor of the Exchequer. The opinion of the court is expressed as follows: Garrow, B.—“The inclination of my mind was with the two judges who decided against the defendant, although if I had been obliged to give my opinion, I should have felt myself extremely pressed by that delivered by my brother Hullock; and, if I had come to that opinion, there would have been no judgment, because the court would have been equally divided. But the decision pronounced was by a majority of the court then sitting. With respect to this motion, I feel great difficulty in point of precedent. If it were to succeed, it would occasion very frequent applications of this kind, and I do not know how the business of the court, the common law business in particular, could be carried on. Unfortunately, my Lord Chief Baron presides in equity, during four days of the week in term. Either nothing at common law could go on until the court were completely full; or if cases of that description were taken before three judges, the absence of one would scarcely ever be dispensed with, although it might arise from illness, or avocations elsewhere. Graham, B.—The case of the absence of a judge occurs perpetually. Alexander, C. B.—I think every precedent bad, that tends to lengthen the proceedings. You take nothing by your motion.”¹

¹ 1 M'Clel. and Y. 245.

"Courts of equity, no more than courts of law, are not obliged to give reasons for their judgment." This proposition by Lord Hardwicke¹ is coupled with his following observations relative to a decree in equity, and a judgment at law. In a case, where on a bill filed a question was, whether a former decree was a determination of the points between the parties, Lord Hardwicke, after mentioning the directions of that decree, adds, "This is as full a determination against the plaintiff, as if a declaration on the point that the plaintiff is not entitled. Courts of equity, no more than courts of law, are not obliged to give reasons for their judgment; if a man in a court of law brings his action for several demands, and he has a judgment for one only, it is as much a judgment, as if there had been a particular determination upon each."²

In a late case in the Court of Exchequer, *Young v. Timmings*, Bayley, B., commenced his judgment by observing,—"Although Lord Lyndhurst has in a great degree anticipated the judgment which I intended to deliver, the parties to the cause are entitled to be satisfied, by knowing the opinion of each judge, and the grounds on which it is founded."³

* A judgment appears to be a judicial opinion, in answer to a question caused by a suit.⁴ If no reason is assigned for that opinion, it appears to be a proposition exclusively confined to the question demanded.⁵ An example of such a proposition seems to be an opinion, which a court of law, on a question sent to it from the Court of Chancery, returns to this court,

¹ 3 Atk. 627. See, also, 1 Atk. 47.

⁴ 3 Bl. Com. 395, 396, 446, 451.

² *Gregory v. Molesworth*, 3 Atk. 626. See, also, 1 Atk. 47.

⁵ *Whittington v. Attorney General*, 2 Dick. 616.

³ 1 Tyrwh. 238.

and, without stating the reasons of it, certifies to be of its opinion.¹

A judicial opinion, in answer to a question caused by a suit, may consist of one judgment of the single judge of a court, or of all the judges of a court; or it may consist of separate judgments of different judges of a court. When it consists of separate judgments of different judges of a court, and each of these judgments is rested on an expressed reason, this reason may be the same in each judgment, or it may be different in each judgment. A different reason in each judgment is frequently met with.² And when, in any case, separate judgments are given, they may form one judicial opinion in answer to the question caused by the suit, notwithstanding each judgment is grounded on a different reason: "the difference in reason is not a difference in opinion."³

The expressed reason of a judgment is an important ingredient in it. General language on this point is,—“The reason of a resolution is more to be considered than the resolution itself.”⁴ “The reason and spirit of cases make law; not the letter of particular precedents.”⁵

The expressed reason of a judgment is important on this account,—that the judgment in which it is found may be an authority to apply the same reason in determining questions caused by other suits. For instance, in *Standen v. Standen*,⁶ a case on the interpretation of a will, the reason or ground of the judg-

¹ *Badham v. Mee*, 7 Bing. 695; 1 Mylne and K. 32, 54.

² *Ashby v. White*, 2 Lord Raym. 938, 950; *Smith v. Richardson*, Willes, 20, 23.

³ *Darcy v. Jackson*, Palmer, 257;

Ashby v. White, and *Smith v. Richardson*, above.

⁴ By Holt, C. J., 12 Mod. 294.

⁵ By Lord Mansfield, 3 Burr. 1364.

⁶ 2 Ves. Jun. 589.

ment is, the court's obligation to satisfy all the words of the will, and its inability to satisfy them, except by construing them to be an execution of a power. And in a subsequent case, *Lewis v. Lewellyn*, that decision was relied on as an authority to apply that reason or ground in the interpretation of a will; Best, J., saying, "That is the general principle of *Standen v. Standen*, and we must look only to the general principle, for it is impossible to find two cases precisely alike. . . . The principle is, that where there is nothing for the will to operate upon, but with reference to the power, it must operate as an execution of the power."¹

It is often material that the reason of a judgment be expressly stated, in order that the extent, to which it is authority, may be clearly marked; for it frequently happens that a case decided on a particular ground, as length of time between the occurring and the prosecuting of a right, would have received a different decision if that ground had been wanting.²

When a decree in chancery dismisses a bill, and the ground of the dismissal does not appear, the case may not be an authority to support a particular position contended for. Thus speaking of *Priest v. Parrot*,³ a case of a bill in equity on a bond, and where the bill was dismissed, Bayley, J., says,—"*Priest v. Parrot* is by no means a decisive authority to show, that such a bond may not be enforced in a court of law; for the decree was, that the bill should be dismissed; and that decree may have proceeded on the ground that the bond might be enforced at law. If the decree had been, that the bond should be deliv-

¹ 1 Turn. & R. 104.

165; *Andrew v. Wrigley*, 4 Bro. C. C.

² *Bonney v. Ridgard*, 1 Cox, 149,
cited 4 Bro. C. C. 138, and 17 Ves.

135, 138.

³ 2 Ves. 160.

ered up to be canceled, then it would have been a strong authority in support of the position contended for."¹

The importance of expressly stating the reason of a judgment is further shown by the circumstance, that often a particular ground is expressly mentioned to be the ground of the judgment.²

In a cause in the House of Lords, Lord Eldon, advertng to a case which had been stated at the bar, and observing that there the judgment of the court below had been reversed, continued his remarks by saying,—“It was their lordships’ habit on such occasions—he wished it had always been their habit when they dissented from the courts below—to state the reasons of their judgment at length. It was always useful to state the reasons which influenced the mind of the judge in giving judgment. If pronounced by a judge, from whose decision there lay an appeal, counsel, and the advisers of parties, had an opportunity of weighing well the grounds of the decision; and when the matter came to the court of last resort, where the principles were settled, which must regulate the decisions of inferior tribunals, it was their duty to consider all the principles, to which facts, in all their varieties, might afterwards be applied.”³

[In the Life of Lord Eldon, by Twiss, the biographer refers to this subject as thus: “Until our own time it was the practice of the House of Lords to pronounce its judgments without a statement of the reasons. Such a practice Lord Eldon did not think it consistent with his duty to continue.”⁴ His opinion

¹ 6 Barn. & Cr. 138.

² *Miller v. Taylor*, 4 Burr. 2407; *Hare v. Groves*, 3 Anstr. 699; *Dicks v. Lambert*, 4 Ves. 731; *Knatchbull v.*

Grueber, 3 Meriv. 146; *Ex parte Chambers*, 1 Mont. & Mac. 134.

³ 2 Dow, 383.

⁴ In 2 Dow, 383, *Wight v. Ritchie*.

upon this subject is thus reported: "It was always useful to state the reasons which influenced the mind of the judge in giving judgment. If pronounced by a judge from whose decision there lay an appeal, counsel, and the advisers of parties, had an opportunity of weighing well the grounds of the decision; and when the matter came to the court of last resort, where the principles were settled which must regulate the decision of inferior tribunals, it was their duty to consider all the principles, to which facts, in all their varieties, might afterwards be applied."

[And where a case was of first impression, he thought it necessary not only that the reasons should be given, but that they should be given fully. Thus, in *Butcher v. Butcher*, 1 Ves. & Bea. 96, he said: "Upon a subject which has been so much the topic of discussion and decision, it would be a waste of time to trace the doctrine, from beginning to end, through all the cases, *as has been my habit*, which I hope will produce at least this degree of service, *that I shall leave a collection of doctrine and authority that may prove useful.*"¹]

A case occurs, in which it was so doubtful on what precise ground it turned, that it was not reported.²

A judgment may be valid, although the reasons of it are faulty: a judge may think that a judgment given was well given, and ought to be affirmed, though he does not approve of the reasons given for that judgment.³ Best, C. J., delivering the judgment

¹ 2 Life of Lord Eldon, by Twiss, ch. lxiii.

² *Chatfield v. Paxton*, cited 2 East, 471; 5 Taunt. 157.

³ 1 Stra. 371. See also 2 Bro. C. C. 86, and *Mountford v. Scott*, 1 Turn. & R. 274. See also 4 Bing. 241.

of the Court of Common Pleas, in a case on the interpretation of certain statutes, speaks thus of the authorities to be found:—"If these are consistent, we are bound by them, even although our own minds do not approve the principles on which they rest. There would otherwise be no certain rule which could be known to those who are required to conform to the law. If the decisions are contradictory, we are to consider the reasons given for them by those who pronounced them. If our predecessors have given no reasons for their judgment, or the reasons given for conflicting judgments are equally unsatisfactory, we are to put that construction on the statutes, which our own unfettered judgment induces us to think the legislature intended should be put on them."¹

In a case where, on an indictment for a misdemeanor, the defendant had been adjudged to be fined, and to levy the fine a *levari facias* had issued, an authority for this writ was a case decided in the reign of one of the Stuarts. And Abbott, C. J., in reply to an objection made to this case, observed,—“It is said that this writ has issued on the authority of a single case in the reign of one of the house of Stuart; and we are desired to say, that cases in those reigns are not to be regarded as law. To that, however, I cannot assent.” And, to the same effect, Best, J., answering the same objection, stated,—“It is said that that case was decided in the reign of Charles II; but if that were an argument, many cases decided by some of the most enlightened judges, Lord Hale and others, would be swept away.”²

It remains to notice the authority at law of a case

¹ 4 Bing. 241. See also 243, 244, and 8 Durn. & E. 205.

² The King v. Woolf, 2 Barn. & Ald. 609.

in equity. Chief Justice Vaughan appears to have thought, that equity is a universal truth, of which all judges in a court of equity must have the same perception. For in a case in the Court of Chancery, where he assisted the Lord Keeper Bridgman, he, on hearing a case in equity cited, remarked,—“I wonder to hear of citing of precedents in matter of equity. For if there be equity in a case, that equity is a universal truth, and there can be no precedent in it. So that in any precedent that can be produced, if it be the same with this case, the reason and equity is the same in itself. And if the precedent be not the same case with this, it is not to be cited, being not to that purpose.”¹ Equity is not, however, such a universal truth, for very frequently different judges of courts of equity entertain different opinions on the judgment, which it is the duty of the court to give in the same case.² And hence, probably, it has been imagined, that the equity of the Court of Chancery varies like the chancellor’s foot. “Equity is a roguish thing. For law we have a measure, know what to trust to; equity is according to the conscience of him that is chancellor, and as that is larger or narrower, so is equity. ’Tis all one, as if they should make the standard for the measure, a chancellor’s foot. What an uncertain measure would this be! One chancellor has a long foot, another a short foot, a third an indifferent foot: ’tis the same thing in the chancellor’s conscience.”³ This however is, in an extreme degree, a wrong view of the matter. In the absence of precedent in a court of equity, as where it does not exist, or is unknown,

¹ 1 Mod. 307.

² Turner v. Harvey, Jacob, 169;

Woodmeston v. Walker, 2 Russ. & M.

197.—1 Meriv. 93, 103; 1 Younge, 116.

³ Selden, Table Talk, tit. Equity.

or is not conclusive, two judges may differ on the judgment, which it is their duty to give in the same or a similar case;¹ and, therefore, in the instance of two cases, the decisions in them may not agree,² or, in the instance of one case, the decision may be reversed on appeal.³ But where a known conclusive precedent exists, the court is bound by it.⁴ This is the expressed opinion of the Lord Keeper Bridgman, in answer to the remark of Chief Justice Vaughan. "Certainly," he says, "precedents are very necessary and useful to us, for in them we may find the reasons of the equity to guide us; and, beside, the authority of those who made them is much to be regarded. We shall suppose they did it upon great consideration, and weighing of the matter, and it would be very strange and very ill, if we should disturb and set aside what has been the course for a long series of time and ages."⁵ And in the same case it is observed by Chief Baron Hale,— "There is a great difference in a case, wherein a man is to make, and where a man sees (and is to follow), a precedent; in the one case a man is more strictly bound up, but in the other he may take a greater liberty and latitude. For if a man be in doubt, *in æquilibrio*, concerning a case, whether it be equitable or no, in prudence he will determine according as the precedents have been, especially if they have been made by men of good authority for learning, &c., and have been continued and pursued."⁶

Not only is a court of equity bound by precedent in this court, but often it is its duty to adhere to pre-

¹ 1 Cox, 148; 1 Younge, 116.

² Norris v. Wilkinson, 12 Ves. 192;
Ex parte Bruce, 1 Rose, 374; Hockley
v. Bantock, 1 Russ. 141.

³ Turner v. Harvey, Jacob, 169;

Woodmeston v. Walker, 2 Russ. & M.
197.

⁴ 1 Vern. 188; 2 Swanst. 414.

⁵ 1 Mod. 307.

⁶ 1 Mod. 309.

cedent in a court of law, in other words, to follow the law.¹ For although the courts of law and of equity possess distinct jurisdictions, they acting in a different manner, and their modes of affording relief being different, it is material that these jurisdictions should be kept perfectly distinct, since by the blending of them in a court of law great inconveniences have at times ensued, yet it is certain that those different courts act in a great degree by the same rules.² And the truth is, that many precedents and rules of a court of law are obligatory on a court of equity, and equally with its own precedents and rules, govern its discretion.³ This doctrine is luminously and comprehensively expressed by Sir J. Jekyll in a case, which concerned a title to an equitable estate. "The law," he says, "is clear, and courts of equity ought to follow it in their judgments concerning titles to equitable estates; otherwise great uncertainty and confusion would ensue; and though proceedings in equity are said to be *secundum discretionem boni viri*, yet when it is asked, *vir bonus est quis?* the answer is, *qui consulta patrum qui leges juraque servat*; and as it is said in Rook's case, 5 Rep. 99 b, that discretion is a science, not to act arbitrarily according to men's wills and private affections; so the discretion which is executed here, is to be governed by the rules of law and equity, which are not to oppose, but each, in its turn, to be subservient to the other; this discretion, in some cases, follows the law implicitly, in others, assists it, and

¹ 1 P. W. 109; 2 Eden, 61; Ambl. 200; 3 Atk. 333; 2 Bro. C. C. 603, 604; 1 Meriv. 494; 1 Turn. & R. 252; 4 Durn. & E. 650.

² 1 Sch. & Lef. 66-71; Ambl. 37; 1 Bro. C. C. 28, 29; 3 Meriv. 277; 3

Swanst. 638; 2 Russ. 86, 87; 5 Durn. & E. 225, 229, 655; 6 Durn. & E. 605; 8 Durn. & E. 592, 593; 7 East, 23; 3 Bos. & P. 169; 9 Price, 473; 10 Price, 219.

³ 2 Burr. 1108; 4 Burr. 2377.

advances the remedy; in others, again, it relieves against the abuse, or allays the rigor of it; but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this court. That is a discretionary power, which neither this nor any other court, not even the highest, acting in a judicial capacity, is by the constitution entrusted with.”¹ This description of the province of a court of equity, and the boundaries of its jurisdiction, is pronounced by Sir T. Clarke to be “full and judicious, and what ought to be deeply imprinted on the mind of every judge.”²

[Lord Campbell, in his introduction to the *Lives of the Lord Chancellors*, says: “It is a common opinion that English equity consists in the judge acting upon his own notions of what is right. . . . But with us there is no scope for judicial caprice in a court of equity more than elsewhere. . . . In former times, *unconscientious* chancellors, talking perpetually of their *conscience*, have decided in a very arbitrary manner, and have exposed their jurisdiction to much odium and many sarcasms. But the preference of individual opinion to rules and precedents has long ceased. ‘The doctrine of the court’ is to be diligently found out, and strictly followed; and the chancellor, sitting in equity, is only to be considered a magistrate to whose tribunal are assigned certain portions of forensic business, to which he is to apply a well-defined system of jurisprudence, being under the control of fixed maxims and prior authorities as much as the judges of the courts of common law.” And then he adds the dictum of Lord Camden:

¹ 2 P. W. 753, cited 4 Durn. & E. 650.

² 1 W. Bl. Rep. 152; 1 Eden's Rep. 214.

"The discretion of a judge is the law of tyrants. It is always unknown; it is different in different men; it is casual, and depends upon constitution, temper, and passion. In the best, it is oftentimes caprice; in the worst, it is every vice, folly, and passion to which human nature is liable."

[Discretion "is to discern between right and wrong, shadows and substances, equity and colorable glosses. . . . It is not to do according to our will and private affections; it is to be limited and bounded. . . . Whoever hath power to act at discretion is bound by the rule of reason and law. For justices must remember, it is a legal discretion in which, in favor of liberty, great tenderness is to be used. And, though there be a latitude of discretion given to one, yet he is circumscribed, that what he does be necessary and convenient, without which no liberty, no jurisdiction can defend it.¹ If judicial discretion were not thus circumscribed, the subject would feel it a crooked line, ruinous to the personal liberties of the people."²

[In Warren's Law Studies, p. 195, the author thus discourses upon this subject: "Let us now very briefly dispose of the erroneous representations of Selden, Lord Kames, and Bentham, as to the *capricious and arbitrary mode of the interference of equity*; that it disregards the light afforded by *precedent*, and looks solely to the circumstances of any particular case. This is also a notion utterly unfounded—at least, as far as concerns the modern system of equity. 'If, indeed,' (says the same enlightened American jurist, Story, from whom we have already quoted,) 'a court of equity in England *did* possess the unbounded

¹ 2 Inst. 16, 298; Hobart, 158.

² 1 Inst. 13; 1 Black. Com.

jurisdiction which has been generally ascribed to it, of correcting, controlling, moderating, and even superseding the law, and of enforcing all the rights, as well as the charities, arising from natural law and justice, and of freeing itself from all regard to former rules and precedents, it would be the most gigantic in its sway, and the most formidable instrument of arbitrary power that could well be devised.' And so our own illustrious commentator: 'If a court of equity were still at sea, and floated upon the occasional opinion which the judge, who happened to preside, might entertain of conscience, in every particular case, the inconvenience which would arise from this uncertainty would be a worse evil than could follow from rules too strict and inflexible. Its power would have become too arbitrary to be endured in a country like this—which boasts of being governed in all respects by LAW, and not by WILL.' To refute the misrepresentations referred to, we shall content ourselves with citing the testimony of three eminent authorities—Blackstone, Lord Redesdale, and Lord Eldon.

[“1. Mr. Justice Blackstone: ‘It has been said that a court of equity is not bound by rules or precedents, but acts from the opinion of the judge, founded on the particular circumstances of every particular case. Whereas the system of our courts of equity is a labored, connected system, governed by established rules, and bound down by precedents from which they do not depart, even although the reason of some of them may, perhaps, be liable to objection,’ ‘from the reverence very properly shown to a series of former determinations, that the rule of property may be uniform and steady. Nay, sometimes a precedent is so strictly followed, that a particular

judgment, founded on special circumstances, gives rise to a general rule.'

[“2. Lord Redesdale: ‘There are certain principles, on which courts of equity act, which are very well settled. The *cases* which occur are various; but they are decided on *fixed principles*. *Courts of equity have, in this respect, no more discretionary power than the courts of law*. They decide new cases as they arise, by the principles by which former cases have been decided, and may thus illustrate and enlarge the operation of those principles; but the principles are as fixed and certain as the principles on which the courts of common law proceed.’¹

[“3. Lord Eldon: ‘The doctrines of this court ought to be as well settled, and made as uniform almost, as those of the common law; laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case. I cannot agree that the doctrines of this court are to be changed with every succeeding judge. Nothing would inflict on me greater pain in quitting this place, than the reflection that I had done anything to justify the reproach, that the equity of this court varies like the chancellor’s foot.’

[“The result of this mode of administering equity has been to make the two systems of jurisprudence, law and equity, ‘equally artificial, founded on the same principles of justice and positive law, but varied by different usages in the forms and mode of their proceedings—the one being originally derived (though much reformed and improved) from the feudal customs,

¹ Lord Redesdale elsewhere says: “Principles of decision adopted by courts of equity, when fully established and made the ground of successive de-

cisions, are considered by these courts as rules to be observed with as much strictness as positive law.

as they prevailed in different ages in the Saxon and Roman judicatures; the other (but with equal improvements) from the imperial and pontifical formularies introduced by their clerical chancellors.'

["Both courts recognize, and are bound by the statute and common law. Where a rule of either the statute or common law is direct, and governs the case, with all its circumstances, or the particular point, a court of equity is as much bound by it as a court of law, and can as little justify a departure from it. If the law commands or prohibits a thing to be done, equity cannot enjoin the contrary, or dispense with the obligation. It will, as the case may admit and require, be guided by light derived from any safe and proper quarter—from the law of nations, the feudal law, the civil law, the *lex mercatoria*, the ecclesiastical law, and foreign law (in cases involving it). 'Could there, indeed,' continues the commentator, 'be a greater solecism than that, in two sovereign independent courts, established in the same country, exercising concurrent jurisdiction, and over the same subject-matter, there should exist, in a single instance, two different rules of property, clashing with or contradicting each other?' And, again, the same great authority correctly assures us, that the structure of jurisprudence which prevails in our courts of equity is inwardly bottomed upon the same substantial foundations as the legal system, however different they may appear in their outward form, from the different tastes of their architects.' . . . 'There is not a single rule of interpreting laws, whether equitable or strictly^{legal} which is not equally used by the judges in the courts both of law and equity; the construction must be, in both, the same, or if they differ, it is only as one court of law may also happen

to differ from another. Each endeavors to fix and adopt the true sense of the law in question: neither can enlarge, diminish, or alter that sense in a single title.' It was, doubtless, a hasty glance at this close correspondence between the two systems, which led a writer on Scotch law into the following misconception of the true position of the two:—'It may be said that *the ancient distinction between law and equity, as administered in England, no longer exists*; but that justice, whether under the name of law or equity, is dispensed, not according to arbitrary or fluctuating rules, depending upon the conscience or discretion of any individual, but under an artificial system of great perfection, in which the principles of rational and enlightened jurisprudence are brought into full and efficient operation, in a manner eminently calculated to give stability and permanence to the law of England.'

[The authority of precedents in the Court of Chancery appears, however, to be of comparatively recent date. Thus, Lord Campbell has said,¹ "There is no scope for individual caprice in a court of equity;" yet, when writing concerning the state of the law at the accession of Henry VIII, A. D. 1509, says:² "Equity decisions at this time depended upon each chancellor's peculiar notions of the law of God, and the manner in which Heaven would visit the defendant for the acts complained of in the bill; and though a rule is sometimes laid down as to where 'a subpoena will lie;' that is to say, where there might be relief in chancery, it was not until long after that authorities were cited by chancellors, or that there was any steady reference by them to "the doctrine of the court;" and again in his "Life of Lord Keeper Williams," speaking of the con-

¹ *Ante*, p. 35.

² 1 Lives of the Chan. 36.

dition of the law at that date (A. D. 1625), says: "The courts of common law were filled with very able judges, many of whose decisions are still quoted as authority. Equity made some progress, but it was not yet regarded as a system of jurisprudence; and so little were decisions in chancery considered binding, as precedents, that they were very rarely reported, however important the question or learned the judge." Professor Wooddeson, in his "Lectures,"¹ says: "Before the splendid abilities of Lord Nottingham had shone forth in the Court of Chancery, and suggested to his successors the outlines of a scientific system in a great cause,² there depending, we find the chief justice referring himself to former adjudications. At which the other chief justice expressed some astonishment, urging this dilemma—that if any precedent could be produced the same with the case before them, the reason and equity would be the same in itself; and if the precedent be not the same it is not to be cited, being not to the purpose. But the lord keeper, properly correcting him, said: "certainly, precedents are very useful and necessary to us; for in them we may find the reasons in the equity to guide us; and, besides, the authority of those that made them is much to be regarded. We shall suppose that they did it upon great consideration or weighing of the matter, and it would be very strange and very ill, if we should disturb and set aside what has been the course for a long series of time and ages.""]

It is not a consequence of the distinct jurisdictions of the courts of law and equity, that from a court of equity, law is wholly excluded. On the contrary, it has been shown, that often equity follows the law.

¹ Lecture 7.

² 1 Mod. 307.

Nor must the same consequence be drawn from the circumstance, that frequently the Court of Chancery, when a question of law there arises, sends this question to a court of law for the opinion of the judges.¹ For this is a proceeding which is not always resorted to: sometimes the court of equity takes on itself to decide the question.² In a cause, in which the vice-chancellor had directed a case for the opinion of the Court of King's Bench, whether a certain *modus* was good in point of law, Lord Eldon, in lamenting in the Court of Chancery that such direction had been given, observed,—“Where there is a clear matter of law, I take it to be very much the duty of this court to give its opinion on that matter of law. To ask the Court of King's Bench a question of law, which this court could itself answer in the first instance, is not the best mode of disposing of a suit in equity.”³

As, therefore, law is not wholly excluded from a court of equity; and its adoption of law, and its expression of an opinion of law, is frequently sanctioned by the jurisdiction of the court, this court's apprehension, recognition, or decision of law may properly, under many circumstances, be authority in a court of law.⁴ And, accordingly it is found, that, although sometimes a case in a court of equity may not be of the highest,⁵ or any,⁶ authority in a court of law; and a proceeding peculiar to equity jurisdiction, as an injunction, may not always be conclusive upon a court

¹ 4 Burr. 2377; 4 Bro. C. C. 371; 1 Meriv. 494. The Court of Exchequer does not send a case to a court of law. *Gaskell v. Gaskell*, 3 Younge & J. 305.

² *Pemberton v. Oakes*, 4 Russ. 166; *Muddle v. Fry*, Mad. and Gel. 270, 273.

³ *Goodenough v. Powell*, 2 Russ. 229.

⁴ 3 Meriv. 277; 12 Price, 189, 190.

⁵ 2 Bos. and P. 26.

⁶ 5 Barn. and Cr. 176; 2 Durn. and E. 73; 6 Durn. and E. 605.

of law;¹ and “cases, which have been decided by the Lord Chancellor, on the principles of general equity at the hearing of bankrupt’s petitions, must not give the rules for decision in the courts of law;”² and cases in the Court of Chancery may not be “of the least avail in a court of law, because the two courts act on different principles, and that, which is the groundwork and foundation of the decision in courts of equity, is directly repugnant to every rule and determination of the courts of law;”³ yet there are instances in which, in a court of law, a case in chancery has been cited,⁴ and as authority relied on,⁵ and even taken as an authority to govern the decision.⁶ On the construction of a statute, *Arnold v. Chapman*,⁷ a case in chancery, was relied on as authority in *Doe v. Waterton*; *Abbott, C. J.*, there saying,—“The case of *Arnold v. Chapman* is a direct authority to show, that copyhold as well as freehold lands are within the operation of the 9 George II, ch. xxxvi.”⁸ So the principle of the decision in *Clayton’s case*,⁹ also a case in chancery, governed the decision in *Bodenham v. Purchas*; the question in which *Abbott, J.*, said was “decided by *Clayton’s case*, which was very fully argued. All the decisions were there before the Master of the Rolls. It was a case decided upon great consideration, and is an authority of great weight. This case in principle

¹ 4 Burr. 2352, 2377, 2378, 2399, 2407; 5 Barn. & Cr. 176; 8 Ves. 224, 225.

² 3 Bos. & P. 492.

³ 4 Durn. & E. 636.

⁴ 1 Lord Raym. 523; 2 Bos. and P. 26; 5 Barn. and Cr. 177.

⁵ 4 Burr. 2352, 2353, 2354, 2399, 2407; 2 Eden, 64; 1 Durn. and E.

762; 4 Durn. and E. 650; 5 Durn. and E. 61-64; 3 Barn. and Ald. 150; 2 Bro. C. C. 651, 652.

⁶ 2 Barn. and Ald. 46, 48; 3 Barn. and Adol. 312, 313; 2 Brod. and B. 73. See also 6 Durn. and E. 476.

⁷ 1 Ves. Sen. 108.

⁸ 3 Barn. and Ald. 150.

⁹ 1 Meriv. 572.

is exactly the same. . . . The principle of that decision governs the present, and there must, therefore, be judgment for the defendant." And Bayley, J., and Holroyd, J., expressed themselves to the same effect.¹ The principle of Clayton's case was also adopted at law in *Brooke v. Enderby*.² In *Mason v. Hill*, the only decision upon a question like that, which there occurred, was the judgment of the Vice-Chancellor, Sir J. Leach, in *Wright v. Howard*;³ and expressly on the authority of that decision, and the reasoning contained in the judgment there delivered, the Court of King's Bench decided *Mason v. Hill*.⁴

Where a rule of property is settled in a court of equity, and it is not repugnant to any principle, rule, or determination at law, there is a propriety in adopting it at law,⁵ since it is "absurd and injurious to the community, that different rules should prevail in different courts on the same subject."⁶

In an important case in the House of Lords, concerning a lease under a power, Lord Eldon, while speaking of the practice of conveyancers, intimated an opinion, "that upon cases of this nature, it might not be amiss, if courts of law would inquire a little more, what has been done as well as said in courts of equity:"⁷ "Courts of law should, as I think, go still further than they commonly do in considering questions of this nature. They should inquire of decisions in courts of equity, not for points founded on determinations merely equitable, but for legal judgments

¹ 2 Barn. and Ald. 39, cited 4 Russ. 169.

² 2 Brod. & B. 70; 4 Moore, 501, cited 4 Russ. 169.

³ 1 Sim. and St. 190.

⁴ 3 Barn. and Adol. 304.

⁵ 1 Durn. and E. 762; 4 Durn. and E. 636; 5 Durn. & E. 229; 6 Ves. 183 -187. See also 4 Bro. C. C. 371.

⁶ 4 Durn. and E. 636.

⁷ *Smith v. Doe*, 2 Brod. and B. 599.

proceeding upon legal grounds, such as those courts of equity have for a long series of years been in the daily habit of pronouncing, as the foundation of their directions and decrees."¹

Some information may be gathered from the books below referred to, on the authority in Westminster Hall of cases in the Star Chamber,² and in the ecclesiastical courts,³ and in Ireland,⁴ or Scotland.⁵

¹ *Smith v. Doe*, 7 Price, 509.

² 4 Burr. 2373, 2374, 2375.

³ 1 Mylne and C. 245. See also in this Treatise, the chapters on the civil and canon laws.

⁴ 2 Meriv. 407, 408; 1 Sim. and St. 214; 2 Bro. C. C. 568; 4 Bro. C. C. 417; 2 Dick. 665.

⁵ 3 Durn. and E. 697.

CHAPTER IV.

OF RULES.

AN important and extensive ground of decision is furnished by certain rules, which are acknowledged by the courts to be authority.¹ Many, probably, of these rules are of too ancient a date to allow of any satisfactory discovery of their origin, being, like many parts of the common law, known and admitted to be law, from time immemorial. The rise of others, although of long standing, can nevertheless with considerable accuracy be traced; and sometimes be fixed on a particular judge,² or decision.³ Another kind is of comparatively modern, and of even late, introduction;⁴ and can be shown to have been created by a particular judge,⁵ or settled or established in a particular case.⁶

A rule appears to be a point decided, or laid down, by competent authority; as by a court of law or equity, or by a single judge in the exercise of his judicial office. It is clear that it is sometimes a point decided by a court of law;⁷ and at other times the opinion of a single judge in a court of law,⁸ or of the single judge of a court of equity;⁹ it is often the

¹ Doe v. Biggs, 2 Taunt. 113.

² 1 Durn. and E. 271, 272.

³ 7 Bing. 280; 2 Ves. and B. 390.

⁴ 2 Bos. and P. 587; 2 Ves. and B. 149; 3 Swanst. 544; 4 Russ. 305.

⁵ 1 Barn. and Cr. 86; 4 Russ. 305; 10 Price, 218, 219, 228.

⁶ 2 Russ. 216, 580, 581; 2 Russ. and M. 134.

⁷ 7 Bing. 280.

⁸ 1 Barn. and Cr. 86.

⁹ 2 Russ. 216, 580, 581; 4 Russ. 305; 10 Price, 218, 219, 228.

result of a judge's investigation of former authorities or practice;¹ and frequently a rule is, the concentrated effect of several cases, as where, on consideration of those cases, "a general principle and rule of law may, although perhaps not explicitly laid down in any of them, be fairly collected from the greater number."² It is further observable, that, in speaking of a judicial opinion delivered at *nisi prius*, it is constantly said, the judge *ruled* the particular point expressed by him.³

The varieties of rules are probably co-extensive with the different subjects and kinds of law-suits. A rule may apply to the capacity of a party to the suit;⁴ to evidence,⁵ or other⁶ practice, on the trial or hearing of a cause; to the interpretation of an instrument, as a parol contract, or a deed, will, or public or private Act of Parliament.⁷

When a rule relates to the nature of things, as such nature existed at a former period, and the reason of the rule corresponds with that nature, then at an after time, if the nature of the things is altered, and by this alteration the rule is become too general, and the reason given for it fails, the rule in a case of this kind is no longer binding. In *Davies v. Powell, Willes, C. J.*, giving the opinion of the court, says—"When the nature of things changes, the rules of law must change too. When it was holden that deer were not distrainable, it was because they were kept principally for pleasure, and not for profit, and were not

¹ 2 Russ. 216, 580, 581; 3 Russ. 435.

² 3 Barn. and Adol. 34.

³ 1 Lord Raym. 728; 5 Durn. and E. 5; 4 Maule and S. 348, 349.

⁴ 1 Durn. and E. 8.

⁵ 4 Maule and S. 353, 354.

⁶ 5 Durn. and E. 5; 4 Maule and S. 348, 349; 16 Ves. 196, 197; 1 Sim. 426; 13 Price, 325; McClel. 485.

⁷ Willes, 332; 1 Durn. and E. 97, n.; 12 East, 604; 1 Barn. and Cr. 86; 3 Barn. and Adol. 459; 2 Taunt. 113; 7 Bing. 279; 2 Younge and J. 618.

sold and turned into money as they are now. But now they are become as much a sort of husbandry, as horses, cows, sheep, or any other cattle. Whenever they are so, and it is universally known, it would be ridiculous to say, that when they are kept merely for profit, they are not distrainable as other cattle, though it has been holden that they were not so when they were kept only for pleasure. The rules concerning personal estates, which were laid down when personal estates were but small in proportion to lands, are quite varied both in courts of law and equity; now that personal estates are so much increased, and become so considerable a part of the property of this kingdom.”¹ In *Ringsted v. Lady Lanesborough*, Lord Mansfield, speaking of a particular general rule relative to the contract of a married woman, observed—“General rules are varied by change of circumstances. Cases arise within the letter, yet not within the reason, of the rule; and exceptions are introduced, which, grafted upon the rule, form a system of law.”² And this opinion his lordship repeated, when, in *Barwell v. Brooks*, observing that the question was, whether a married woman can be sued for a debt on her own contract, he continued—“The general principle of law is against her liability. But *quicquid agant homines* is the business of courts, and as the usages of society alter, the law must adapt itself to the various situations of mankind. Hence, centuries ago, exceptions have been engrafted upon this rule, as in the case of abjuration, &c.”³ The same opinion is reiterated by Lord Mansfield in *Corbett v. Poelnitz*, where, noticing the same rule, he stated—

¹ Willes, 48, 51.² 3 Doug. ed. Frere and Ros. 373³ 3 Doug. ed. Frere and Ros. 203.

"This is the general rule. But then it has been properly said, that as the times alter, new customs and new manners arise: these occasion exceptions, and justice and convenience require different applications of these exceptions within the principle of the general rule."¹

[“I think it the duty of this court,” said Lord Cottenham, “to adopt its practice and course of proceeding to the existing state of society, and not by too strict an adherence to forms and rules established under different circumstances, to decline to administer justice and to enforce rights, for which there is no remedy.”] “I think it a safer course upon this occasion, as I find has been the opinion of other judges from the earliest periods of the law,” said Chief Justice Tindal, “to adhere to *any rule* which can be safely inferred from the cases rather than to substitute another, although it may appear upon general principles more reasonable and more just.”³ “It is one of the noblest properties of the common law,” said Chief Justice Gibson, “that instead of molding the habits, the manners, and the transactions of mankind to inflexible rules, it adapts itself to the business and circumstances of the times, and keeps pace with the improvement of the age.”⁴]

With reference, it would seem, to Lord Mansfield’s opinion, *supra*, Lord Kenyon has said,—“I confess I do not think that the courts ought to change the law, so as to adapt it to the fashion of the times: if an alteration in the law be necessary, recourse must be had to the legislature for it.”⁵ And on another occasion the

¹ Corbett v. Poelnitz, 1 Durn. and E. 8.

² Walworth v. Holt, 4 My. & C. 635.

³ Mirehouse v. Rennell, 8 Bing. 515.

⁴ Lyle v. Richards, 9 S. & R. 351.

⁵ Ellah v. Leigh, 5 Durn. and E. 682.

same learned lord observed, "We must not by any whimsical conceits, supposed to be adapted to the altering fashions of the times, overturn the established law of the land: it descended to us as a sacred charge, and it is our duty to preserve it."¹ [On still another occasion the same judge is reported to have said: "It is my wish and my comfort to stand *super antiquas vias*. I cannot legislate; but by my industry I can discover what my predecessors have done, and I will servilely tread in their steps."² "You have but to show me the footsteps of my predecessors, and I will blindly follow."³

["With respect to progressive societies, it may be laid down, that social necessities and social opinion are always more or less in advance of law. We may come indefinitely near to the closing of the gap between them, but it has a perpetual tendency to reopen—law is stable; the societies we are speaking of are progressive. The greater or less happiness of a people depends on the degree of promptitude with which the gulf is narrowed.

["A general proposition of some value may be advanced with respect to the agencies by which law is brought into harmony with society. These instrumentalities seem to me to be three in number, legal fictions, equity, and legislation. Their historical order is that in which I have placed them. Sometimes two of them will be seen operating together, and there are legal systems which have escaped the influence of one or other of them. But I know of no instance in which

¹ Clayton v. Adams, 6 Durn. and E. 605. On time advancing, and things and opinions, and law, changing with it, see further, 1 East, 155, 156, and 1 Mylne and K. 294.

² Bauerman v. Radenius, 7 T. R. 668.

³ Cited Garner v. Stubblefield, 5 Texas R. 564.

the order of their appearance has been changed or inverted. The early history of one of them, equity, is universally obscure, and hence it may be thought by some that certain isolated statutes, reformatory of the civil law, are older than any equitable jurisdiction. My own belief is that remedial equity is everywhere older than remedial legislation; but, should this be not strictly true, it would only be necessary to limit the proposition respecting their order of sequence to the periods at which they exercise a sustained and substantial influence in transforming the original law.

[“I employ the word ‘fiction’ in a sense considerably wider than that in which English lawyers are accustomed to use it, and with a meaning much more extensive than that which belonged to the Roman ‘*fictiones*.’ *Fictio*, in old Roman law, is properly a term of pleading, and signifies a false averment on the part of the plaintiff which the defendant was not allowed to traverse; such, for example, as an averment that the plaintiff was a Roman citizen, when in truth he was a foreigner. The object of these ‘*fictiones*’ was, of course, to give jurisdiction, and they, therefore, strongly resembled the allegations in the writs of the English Queen’s Bench and Exchequer, by which those courts contrived to usurp the jurisdiction of the Common Pleas, the allegation that the defendant was in custody of the king’s marshal, or that the plaintiff was the king’s debtor, and could not pay his debt by reason of the defendant’s default. But I now employ the expression ‘legal fiction,’ to signify any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified. The words, therefore, include the instances of fictions which I have cited from the English and Roman law,

but they embrace much more, for I should speak both of the English Case-law and of the Roman *responsa prudentum*, as resting on fictions. Both these examples will be examined presently. The *fact* is in both cases that the law has been wholly changed: the *fiction* is that it remains what it always was. It is not difficult to understand why fictions, in all their forms, are particularly congenial to the infancy of society. They satisfy the desire for improvement, which is not quite wanting, at the same time that they do not offend the superstitious disrelish for change which is always present. At a particular stage of social progress they are invaluable expedients for overcoming the rigidity of law, and, indeed, without one of them, the fiction of adoption which permits the family tie to be artificially created, it is difficult to understand how society would ever have escaped from its swaddling-clothes, and taken its first steps towards civilization. We must, therefore, not suffer ourselves to be affected by the ridicule which Bentham pours on legal fictions wherever he meets them. To revile them as merely fraudulent is to betray ignorance of their peculiar office in the historical development of law. But at the same time it would be equally foolish to agree with those theorists who, discerning that fictions have had their uses, argue that they ought to be stereotyped in our system. There are several fictions still exercising powerful influence on English jurisprudence which could not be discarded without a severe shock to the ideas, and considerable change in the language, of English practitioners; but there can be no doubt of the general truth that it is unworthy of us to effect an admittedly beneficial object by so rude a device as a legal fiction. I cannot admit any anomaly to be innocent which makes the law either more difficult

to understand or harder to arrange in harmonious order. Now, among other disadvantages, legal fictions are the greatest of obstacles to symmetrical classification. The rule of law remains sticking in the system, but it is a mere shell. It has been long ago undermined, and a new rule hides itself under its cover. Hence there is at once a difficulty in knowing whether the rule which is actually operative should be classed in its true or in its apparent place, and minds of different cast will differ as to the branch of the alternative which ought to be selected. If the English law is ever to assume an orderly distribution, it will be necessary to prune away the legal fictions which, in spite of some recent legislative improvements, are still abundant in it.

[“The next instrumentality by which the adaptation of law to social wants is carried on, I call equity, meaning by that word any body of rules existing by the side of the original civil law, founded on distinct principles, and claiming incidentally to supersede the civil law in virtue of a superior sanctity inherent in those principles. The equity, whether of the Roman prætors or of the English chancellors, differs from the fictions which in each case preceded it, in that the interference with law is open and avowed. On the other hand, it differs from legislation, the agent of legal improvement which comes after it, in that its claim to authority is grounded, not on the prerogative of any external person or body, not even on that of the magistrate who enunciates it, but on the special nature of its principles, to which it is alleged that all law ought to conform. The very conception of a set of principles, invested with a higher sacredness than those of the original law and demanding application independently of the consent

of any external body, belongs to a much more advanced stage of thought than that to which legal fictions originally suggested themselves.

[“Legislation, the enactments of a legislature, which, whether it take the form of an autocratic prince, or of a parliamentary assembly, is the assumed organ of the entire society, is the last of the ameliorating instrumentalities. It differs from legal fictions, just as equity differs from them; and it is also distinguished from equity, as deriving its authority from an external body or person. Its obligatory force is independent of its principles. The legislature, whatever be the actual restraints imposed on it by public opinion, is in theory empowered to impose what obligation it pleases on the members of the community. There is nothing to prevent its legislating in the wantonness of caprice. Legislation may be dictated by equity, if that last word be used to indicate some standard of right and wrong to which its enactments happen to be adjusted; but then these enactments are indebted for their binding force to the authority of the legislature, and not to that of the principles on which the legislature acted. And thus they differ from rules of equity, in the technical sense of the word, which pretend to a paramount sacredness, entitling them at once to the recognition of the courts, even without the concurrence of prince or parliamentary assembly. It is the more necessary to note these differences, because a student of Bentham would be apt to confound fiction, equity, and statute law under the single head of legislation. They all, he would say, involve *law-making*; they differ only in respect of the machinery by which the new law is produced. That is perfectly true, and we must never forget it; but it furnishes no reason why we should deprive ourselves of so convenient a term as legisla-

tion, in the special sense. Legislation and equity are disjoined in the popular mind, and in the minds of most lawyers; and it will never do to neglect the distinction between them, however conventional, when important practical consequences follow from it.

[“It would be easy to select from almost any regularly developed body of rules examples of *legal fictions*, which at once betray their true character to the modern observer. In the two instances which I proceed to consider, the nature of the expedient employed is not so readily detected. The first authors of these fictions did not, perhaps, intend to innovate; certainly did not wish to be suspected of innovating. There are, moreover, and always have been, persons who refuse to see any fiction in the process, and conventional language bears out their refusal. No examples, therefore, can be better calculated to illustrate the wide diffusion of legal fictions, and the efficiency with which they perform their two-fold office of transforming a system of laws, and of concealing the transformation. We in England are well accustomed to the extension, modification, and improvement of law by a machinery which, in theory, is incapable of altering one jot or one line of existing jurisprudence. The process by which this virtual legislation is effected is not so much insensible as unacknowledged. With respect to that great portion of our legal system which is enshrined in cases, and recorded in law reports, we habitually employ a double language, and entertain, as it would appear, a double and inconsistent set of ideas. When a group of facts come before an English court for adjudication, the whole course of the discussion between the judge and the advocates assumes that no question is, or can be, raised which will call for the application of any principles but old ones, or of any

distinctions but such as have long since been allowed. It is taken absolutely for granted that there is somewhere a rule of known law which will cover the facts of the dispute now litigated; and that, if such a rule be not discovered, it is only that the necessary patience, knowledge, or acumen is not forthcoming to detect it. Yet the moment the judgment has been rendered and reported, we slide unconsciously or unavowedly into a new language and a new train of thought. We now admit that the new decision has modified the law. The rules applicable have, to use the very inaccurate expression sometimes employed, become more elastic. In fact, they have been changed. A clear addition has been made to the precedents, and the canon of law elicited by comparing the precedents is not the same with that which would have been obtained if the series of cases had been curtailed by a single example. The fact that the old rule has been repealed, and that a new one has replaced it, eludes us, because we are not in the habit of throwing into precise language the legal formulas which we derive from the precedents, so that a change in their tenor is not easily detected, unless it is violent and glaring. I shall not now pause to consider at length the causes which have led English lawyers to acquiesce in these curious anomalies. Probably it will be found that originally it was the received doctrine that somewhere, *in nubibus* or *in gremio magistratum*, there existed a complete, coherent, symmetrical body of English law, of an amplitude sufficient to furnish principles which would apply to any conceivable combination of circumstances. The theory was at first much more thoroughly believed in than it is now; and, indeed, it may have had a better foundation. The judges of the thirteenth century may have really

had at their command a mine of law unrevealed to the bar and to the lay-public, for there is some reason for suspecting that in secret they borrowed freely, though not always wisely, from current compendia of the Roman and Canon laws. But that storehouse was closed so soon as the points decided at Westminster Hall became numerous enough to supply a basis for a substantive system of jurisprudence; and now, for centuries English practitioners have so expressed themselves as to convey the paradoxical proposition, that, except by equity and statute law, nothing has been added to the basis since it was first constituted. We do not admit that our tribunals legislate; we imply that they have never legislated; and yet we maintain that the rules of the English common law, with some assistance from the Court of Chancery and from Parliament, are co-extensive with the complicated interests of modern society.”^{1]}

A rule, that is become settled law, is binding on the courts, and to be followed.² A rule has accordingly been adhered to in the cases named, as examples, in the margin.³ And a rule, that is become settled law, is to be followed, although some possible inconvenience may grow from a strict observance of it;⁴ or although it is not “bottomed in reason;”⁵ or a satisfactory reason for it is wanted;⁶ or although the principle of the rule appears to be doubtful;⁷ or

¹ Maine's Ancient Law, N. Y. ed. ch. ii.

² 1 W. Bl. Rep. 181; 1 Eden, 250; 7 Bing. 279, 280; 3 Ves. 529; 7 Ves. 199; 1 Russ. 423; 3 Russ. 35; 1 Sch. and Lef. 5.

³ The King v. Brighthelmston, 5 Durn. and E. 188; Goodtitle v. Otway, 7 Durn. and E. 399; The King v. Harringworth, 4 Maule and S. 350;

Bowyer v. Bright, 13 Price, 316, McClell. 479; Doughty v. Bull, 2 P. W. 320; Hincksman v. Smith, 3 Russ. 435; Thomas v. Montgomery, 1 Russ. and M. 739.

⁴ 4 Maule and S. 352.

⁵ 7 Durn. and E. 41b.

⁶ 8 Bing. 536, 537, 557.

⁷ 14 Ves. 449; 16 Ves. 196, 197.

although both the principle and the policy of the rule may be questioned;¹ or although in some particular cases, it may be "productive of hardship and oppression;"² or although it has been "objected to and lamented by great authority;"³ or although "the courts have always shown some dissatisfaction at the rule, and endeavor, if there is any room to do it, to distinguish cases out of it; have said indeed they would not break the rule, but at the same time have said, they would not go one jot further, and have been fond of distinguishing cases since, if possible."⁴

"Rules are to be applied according to circumstances, but circumstances are not to control rules."⁵

"If," says Lord Loughborough, "there is a general hardship affecting a general class of cases, it is a consideration for the legislature, not for a court of justice; if there is a particular hardship, from the particular circumstances of the case, nothing can be more dangerous or mischievous, than, upon those particular circumstances, to deviate from a general rule of law. The consequence is, that law ceases to be a system."⁶

* And Tindal, C. J., when adhering to a rule to be inferred from decided cases, observed, that he thought it "a safer course upon this occasion, as I find has been the opinion of other judges from the earliest periods of the law, to adhere to any rule, which can be safely inferred from the cases, rather than to substitute another, although it may appear upon general principles more reasonable and more just."⁷

[“It has been directly decided in the case of The

¹ 3 Russ. 435.

⁴ 3 Atk. 68.

² 1 Durn. and E. 8; 7 Durn. and E. 415; 7 Bing. 280; 2 Ves. Jun. 426, 427.

⁵ By Lord Redesdale, 2 Sch. and Lef. 239.

⁶ 2 Ves. Jun. 426.

³ 2 Younge and J. 623

⁷ 8 Bing. 557.

People v. Phelps (5 Wend. 10), and the principle again reiterated and declared to have been settled in the former case in The People v. Warner (Id. 271.) Now, if this had been an *obiter dictum* merely, or if we could see that some important principle had been overlooked by the court, and not considered, we might have disregarded this case as an authority. Such, however, is not the fact. The construction and the effect of the provision of the revised statutes in question was the very point on which the case of The People v. Phelps turned. The court, too, were aware of all the decisions at common law, and of all the statutory enactments necessary to be considered in coming to a right judgment upon the question before them. Under such circumstances, we must regard this decision as binding upon us, or we must abandon the principle of '*stare decisis*,' and make the stability and certainty of the law depend on the individual opinions of successive judges. It is better that an erroneous rule should be endured, till it can be corrected by a higher tribunal, or changed by the legislature, than that the law should be subject to constant fluctuation and change."¹

[“In Brown v. Scofield, 8 Barb. 239, it was suggested that the common law of England was not adapted to the subject of inland navigation in this country; and so, as to large rivers, it has been decided by the courts of Pennsylvania. So far, it seems, the principles of the civil law prevail in that State. No doubt the genius of our institutions, the nature and condition of the country, and the pursuits of the people, make some portions of the common law, and to a certain extent, necessarily inapplicable here. But,

¹ The People v. Tredway, 3 Barb. 474.

except as to our internal polity, and alterations made by the Constitution and by positive enactments, there is not much diversity; and certainly not in this State. And, as the courts are to expound, and not make the law, especially on questions affecting real estate, *stare decisis* is the safe rule. The treatise of Lord Hale has received high commendation in this country; and, in this State, that portion of it relating to this subject has been sanctioned by our courts, and its doctrines, I think, may be applied to this case, and justice be done to all parties.”¹]

It is not disputed that a settled rule is law. But it is sometimes a matter of difficulty to ascertain the rule,² and a matter of equal difficulty to apply it to particular circumstances.³ A difficulty of the latter kind is thus mentioned by Vaughan, B.: “It is not upon the principles of law that I am constrained to differ from my learned brothers, but upon the application of that law to the particular facts of this case. That a general release is an absolute bar to all actions, is admitted on all hands, and was so decided in Dyer’s Reports; it is not, therefore, upon the rule itself, but upon the application of the rule, that any difference exists.”⁴ To the like effect it is said by Sir A. Hart: “That the rule of a court of equity is, that a man shall not be compelled to answer to any facts which may tend to criminate him, or subject him to penalties or forfeitures, is undeniable. But the due application of this rule to the circumstances of individual cases has been, at all times, a matter of much controversy; and so much so, that, I believe, not less than 100 cases are to be found in the reports, in which the question

¹ *Morgan v King*, 18 Barb. 287.

² 12 Price, 124.

³ 1 Ves. and B. 491.

⁴ 2 Younge and J. 414.

was, whether the defendant was or was not bound to give the discovery sought for. The due application of the rule to the present case is that which I have labored to arrive at.”¹

A rule is a principle of the law;² and many principles recognized in, or made the ground of, a judgment, appear to be rules.³ A principle is a common ground of decision.”⁴ [When principles are ascertained, they are as authoritative upon the courts, and control the decisions in particular cases as absolutely, as a legislative enactment.⁵]

¹ 1 Sim. 426.

² Co. Litt. 11 a; 1 Kenyon, 461; 1 Dow and Cl. 379,

³ 5 Durn. and E. 385; 3 Barn. and Adol. 34; 3 Bing. 598; 3 Meriv. 277 278.

⁴ *The King v. Debenham*, 2 Barn. and Ald. 185; *Fletcher v. Lord Sondes*, 3 Bing. 598; *Ex parte James*, 8 Ves. 337, 345, 348; *Hillary v. Waller*, 12 Ves. 239, 270; *Dearle v. Hall*, and *Loveridge v. Cooper*, 3 Rnss. 1, 58, 60 —2 Bos. and P. 24; 5 Durn. and E.

385; 7 Durn. and E. 148; 2 Barn. and Ald. 610, 612; 2 Brod. and B. 505; Ambl. 249; 3 Ves. 671; 7 Ves. 195; 10 Ves. 385, 393, 394; 13 Ves. 265; 2 Meriv. 103; 3 Meriv. 277; 1 Jac. and W. 119, 244, 247, 248. In these authorities will be found mentioned a variety of principles.

⁵ *Commonwealth v. Chapman*, 13 Met. 68; *Martin v. Martin*, 25 Ala. 201; *Powell v. Brandon*, 24 Miss. 343.

CHAPTER V.

OF DICTA EXPRESSED ON THE BENCH.

It commonly happens that in the progress of a cause, and frequently in the course of a judgment, which a judge delivers, he has an opportunity of expressing two different kinds of opinion, namely, judicial and extra-judicial.

A judicial¹ opinion is one, that is on the question before the court.² A judicial opinion may, it would seem, also be characterized, as "a resolution or determination," "a direct solemn opinion," a "formed decisive resolution," an "adjudication," a "professed or deliberate determination."³

An extra-judicial⁴ opinion may be, an opinion given on a question, that it was unnecessary to decide in the case where it was given;⁵ or on a point, which was not the point then in question;⁶ or only an opinion declared incidentally in the argument of the case;⁷ or a proposition generally expressed, and which the case, or the circumstances of the case, did not call for;⁸ or an opinion on a point, that was not the point, which was argued before the court, or upon which the court pronounced judgment;⁹ or words uttered upon

¹ 1 H. Bl. 63; 5 Maule and S. 185; 3 Barn. & Ald. 122; 4 Barn. and Adol. 207.

² Willes, 666. See also 5 Taunt. 159, and 1 Crompt. and M. 745.

³ 4 Burr. 2068.

⁴ 2 Bos. & P. 375; 1 H. Bl. 59; 4 Taunt. 626; 5 Maule and S. 185, 186;

3 Barn. and Ald. 122; 5 Barn. and Cr. 576; 8 Barn. and Cr. 519.

⁵ 4 Taunt. 626.

⁶ 1 Stra. 37.

⁷ Ibid.

⁸ 5 Taunt. 153, 159.

⁹ 3 Barn. and Ald. 122.

a point, totally different from that, which the court had then to decide;¹ or a statement, that was not essential to the decision of the case;² or that was wholly unnecessary for the decision of the actual points, which were before the court;³ or an opinion, not called for by the case, and which it was unnecessary to give.⁴ [Thus Chief Justice Cockburn, referring to two decisions as not conclusive, says: "But in both those cases * * the wide doctrine embraced in the judgment was wholly unnecessary to the decision, and we, therefore, feel ourselves warranted, and, indeed, bound to consider the question as one not concluded by authority and upon which we are called upon to form our own judgment." ⁵]

One kind of extra-judicial opinion is, an opinion called an *obiter dictum*,⁶ or saying; which is sometimes portrayed in these terms,—“That *dictum* is an *obiter* saying only, and not a resolution or determination of the court, or a direct solemn opinion of the judge from whom it dropped; no formed decisive resolution, no adjudication, no professed or deliberate determination.”⁷ “These words are nothing more than an *obiter dictum*, uttered upon a point totally different from that, which the court had then to decide.”⁸ “It seems to have been a mere *obiter* opinion, not called for by the case, and which it was unnecessary to give.”⁹ “What was dropped about it

¹ 1 Russ. 48.

² 3 Russ. 71, 77.

³ 3 Russ. 74.

⁴ 2 Younge and J. 379.

⁵ Banks v. Goodfellow, 22 Law Times, N. S. 813; 39 Law Journal Rep. 237 Q. B.

⁶ 1 Burr. 153; 2 Burr. 858; 4 Burr. 2068; Willes, 666; 5 Barn. and Cr. 556; 1 Russ. 48; 2 Younge and J. 379.

⁷ 4 Burr. 2068.

⁸ 1 Russ. 48.

⁹ 2 Younge and J. 379.

in Calvin's case was a mere *obiter* opinion, thrown out by way of argument and example."¹

Chief Justice Vaughan thus speaks of judicial and extra-judicial opinions,—“An extra-judicial opinion, given in or out of court, is no more than the *prolatum* or saying of him who gives it, nor can be taken for his opinion, unless everything spoken at pleasure must pass as the speaker's opinion. An opinion given in court, if not necessary to the judgment given of record, but that it might have been as well given, if no such, or a contrary opinion, had been broached, is no judicial opinion, no more than a *gratis dictum*. But an opinion, though erroneous, concluding to the judgment, is a judicial opinion, because delivered under the sanction of the judge's oath, upon deliberation, which assures it is, or was, when delivered, the opinion of the deliverer.”²

Dicta obiter,³ or otherwise extra-judicial,⁴ are, as well as judicial *dicta*, authority; materials, that is, which a judge is bound to, in some degree, regard, in constructing a judgment which he gives.⁵

Dislike of giving *obiter*,⁶ or other⁷ extra-judicial, opinions, is often expressed on the bench; and certain it is, that an opinion of either kind may be productive of much mischief;⁸ because, being in some degree authority, a tendency of it is, to uphold a doctrine, or point, which perhaps on examination cannot be sus-

¹ 2 Burr. 858.

² Vaughn. 382.

³ 1 Burr. 153; 4 Burr. 2068; 5 Barn. and Cr. 556; 1 Russ. 48; 2 Younge and J. 379.

⁴ 1 Stra. 37, 39; 1 H. Bl. 53, 54, 59, 63; 4 Taunt. 626; 5 Taunt. 153; 3 Barn. and Ald. 122; 5 Barn. and Cr. 576; 3 Russ. 71, 74, 76, 77.

⁵ 1 W. Bl. 101; 5 Durn. and E. 7; 5 Taunt. 159; 7 Taunt. 671, 674; 3 Barn. and Cr. 156; 4 Bro. C. C. 37; 11 Ves. 529, 530; 19 Ves. 357, 360, 365, 488.

⁶ Willes, 666.

⁷ 2 Bos. and P. 375.

⁸ Willes, 666.

tained, while the support which it derives from the *dictum* is sufficiently powerful to invite to litigation.¹ Accordingly, at the outset of a judgment delivered by Willes, C. J., that learned judge said,—“I shall confine myself to the question before us, because I have observed great mischiefs arise from judges giving *obiter* opinions.”² Also Heath, J., bears testimony, that “many judges have avoided giving extra-judicial opinions.”³ And Lord Kenyon, speaking of the charter, which incorporated the College of Physicians, says, “By what fatality it has happened, that almost ever since this charter was granted, this learned body have been in a state of litigation, I know not; and I cannot but lament, that the learned judges, in deciding the cases reported in Burrow, did not confine themselves to the points immediately before them, and dropped hints, that perhaps have invited litigation.”⁴ *Steel v. Houghton*,⁵ and probably *Worlledge v. Manning*,⁶ is an instance, in which an extra-judicial opinion has been employed to uphold, if it did not incite to, a suit, which on discussion was found to be incapable of support.⁷ [Perhaps *Dain v. Wyckoff*, 18 N. Y. 45 and 7 N. Y. 191, is another instance of the like kind; that case was for seduction of plaintiff’s daughter; when the case was before the court, it was held the action would not lie because the woman alleged to have been seduced was in the defendant’s employ, but the court added that the action could be maintained if the defendant had taken the woman into his employ

¹ 1 H. Bl. 53—63, on the *dicta* of Sir M. Hale, and Mr. Justice Hewitt; 7 Durn. and E. 287. See also 3 Barn. and Cr. 156.

² Willes, 666.

³ 2 Bos. and P. 375.

⁴ 7 Durn. and E. 287.

⁵ 1 H. Bl. 51.

⁶ 1 H. Bl. 53, n., and cited *ibid*, 53, 61.

⁷ 1 H. Bl. 53—63, on the *dicta* of Sir M. Hale, and Mr. Justice Hewitt.

with the intent to seduce her. This hint was apparently acted upon, and on the second trial the plaintiff established a case within this *dictum* and succeeded.]

Very commonly a character of a *dictum* is, its capacity to be applied to more than one state of facts; a capacity that is occasioned by the general language in which it is expressed. The value, however, which it bears when applied to one state of facts, it may not carry if applied to facts which are different. Hullock, B., speaking of a *dictum* of Holt, C. J., says,—“With respect to the decision of Lord Chief Justice Holt, it is uncertain under what circumstances, and as applicable to what state of facts, that *dictum* was delivered. It may be good in point of law, if applicable to a particular state of facts.”¹

The subject of a debtor's fraudulent preference of his creditor² offers a fit illustration of the same doctrine.³ “A bankrupt, when in contemplation of his bankruptcy, cannot by his voluntary act favor any one creditor.”⁴ “Any payment made by a trader before an act of bankruptcy, and in contemplation of such act, and with a view on his part to give a preference to a particular creditor, is void.”⁵ “A trader cannot in contemplation of bankruptcy dispose of his goods of his own accord, without application on the part of his creditor. But it is not sufficient to avoid the delivery of goods by a trader, that such delivery be made voluntarily on his part, and that an act of bankruptcy ensues; it must also appear that he had the act of bankruptcy in contemplation at the time of the delivery.”⁶ These passages convey a general idea

¹ 3 Younge and J. 112.

⁴ 1 Durn. and E. 157.

² See the Bankrupt Act, 6 Geo. IV, c. 16, s. 82.

⁵ 2 Bos. and P. 587.

³ 7 Bing. 448—450.

⁶ 2 Bos. and P. 584.

of the law of preference, and for this purpose have been transcribed. In *Hartshorn v. Slodden, W.*, being indebted to the defendant in 150*l.*, for which he had given his promissory note, was applied to by her on the 10th September, 1800, for a further security, upon which he gave her a bond for payment of the debt in six months. After this, hearing that *W.* was in failing circumstances, the defendant, on the 29th November, in the same year, desired *W.* to let her have some of the goods out of his shop, in payment of her debt. To this *W.* agreed, the goods were sent, and he made out a bill of parcels to the defendant, in which he charged the goods at 90*l.*, which was more than their value, and an endorsement was made upon the bond, for the receipt of 90*l.* in part payment of the debt. On the 9th of December following, *W.* committed an act of bankruptcy. Now, in this cause, involving the circumstances detailed, Lord Alvanley made these observations:—"Nor has it ever been held, that if a creditor press for payment of his debt, and thereby obtain goods, that the intention of the bankrupt shall be called in aid to set aside the transfer. If the goods be delivered through the urgency of the demand, or the fear of prosecution, whatever may have been in the contemplation of the bankrupt, this will not vitiate the proceeding." And these observations, it is material to remark, were made in a case, where, to adopt the language there used by Chambre, J., "the bankrupt made a very good bargain; for, in making out his bill of parcels, he charged the defendant a higher price than the goods were worth. It is true, that the defendant could not have put the bond in suit at that time, but still she might have injured the bankrupt's credit by being clamorous for her debt, and perhaps have pre-

vented him from continuing his trade.”¹ In a case then so circumstanced, where an ingredient in it is, a benefit to the bankrupt by the delivery of the goods, occurs Lord Alvanley’s opinion, that the debtor’s contemplation of bankruptcy, “whatever may have been in the contemplation of the bankrupt,” “will not vitiate the proceeding.” And a similar opinion is expressed by Lord Ellenborough in *Crosby v. Crouch*.² Suppose, however, a case, in which, by pressure for payment, the creditor obtains goods of his debtor, but a benefit to the latter is not an ingredient, here the debtor’s contemplation of bankruptcy may vitiate the proceeding. Such a case is *Thornton v. Hargreaves*, where a bill of sale made by a debtor to certain of his creditors swept away the whole of his property; an effect which caused the bill to be in itself an act of bankruptcy. “Taking,” said Lord Ellenborough, “the conversation reported between the defendants and the bankrupt to be a threat of process, if they did not receive payment or security for their demand, I do not see how the execution of such a threat could put the bankrupt in a worse situation than the actual transfer of the goods did; for that left him without any property, and he was immediately obliged to break up his business and leave his home. This would rather show, that he did not make the transfer by dint of threat, for he did not redeem himself even from any present difficulty by doing the act; which is the motive for such an act when really done under the pressure of a threat. And if he got nothing by evading the threat, I should rather say that it was a volun-

¹ 2 Bos. and P. 582.

² 11 East, 256.

tary act and preference on his part as to the particular creditors.”¹

The conclusion come to is, that the opinions of Lord Alvanley and Lord Ellenborough, on the need to inquire into the debtor's contemplation of bankruptcy, are not contradictory, but on the contrary are reconcilable and consistent, because they are affixed to different facts. The whole of the subject, however, now under consideration, the application of general dicta to different circumstances, is better stated, and from the same sources illustrated, by Alderson, J., in his judgment delivered in *Cook v. Rogers*, a case on preference by a bankrupt. That judgment is itself authority in the matter. “In all these cases, there are,” says the learned judge, “two questions: one, whether the payment has been made in contemplation of bankruptcy; the other, whether it has been made voluntarily or not. These are questions of fact, which must be left to the jury, upon the circumstances of each case, and this consideration will, I think, reconcile all the decisions. The apparent contradiction arises from treating observations, which have really been made with reference to the peculiar facts of the cause under discussion, as general principles of law and of universal application. Thus, in *Hartshorn v. Slodden*, Lord Alvanley said that the intention of the bankrupt should not be called in aid to set aside a transfer, but [?] in a case, as he says, where a creditor presses for payment of his debt, and *thereby* obtains goods. ‘If the goods be delivered *through the urgency of the demand*, whatever may have been in the contemplation of the bankrupt will not vitiate the proceeding.’ So, in *Crosby v. Crouch*, Lord Ellenborough considered it

¹ 7 East, 544.

immaterial to inquire into the bankrupt's intentions; but that was because the other facts in that case established, that the delivery of the goods was 'not referable to any supposition of favor and preference, but to urgency and importunity on the part of the person obtaining the deposit.' On the other hand, in *Thornton v. Hargreaves*, the motives of the bankrupt were, by the same learned judge, deemed material, because the threat of the creditor, if carried into effect, 'could not put the bankrupt in a worse situation than the actual transfer of the goods.'—'He did not relieve himself even from any present difficulty by doing the act.' It seems to me, therefore, that the motives and intentions of the bankrupt may be material or immaterial, or, to speak accurately, may be more or less material, according to his situation, to the nature of the threat, and the degree and period of urgency by the creditor. In like manner we find, that in cases where the payment has been made before the debt was due, that circumstance has sometimes been relied on as an indication that the payment is voluntary, and at other times has been said to be immaterial; but neither in the one case nor in the other do these facts of themselves furnish any certain criteria; they are only ingredients in the whole question upon which the jury are to come to a determination. Threats on the part of the creditor are a strong circumstance to show, that the payment ensuing is not voluntary: but if, as here [the particular case,] the party be not placed in a better situation by yielding to the threats, or if he disclose such a reason for preference that the threats could obviously have produced no perceptible effect on his mind, those are circumstances which afford a strong inference the other way. It has been urged, indeed, that the motive of the bankrupt in this case was altogether immate-

rial, and if, as in *Hartshorn v. Slodden*, the payment had been clearly made in consequence of the threat, it might have been immaterial to examine whether the bankrupt were also actuated by any other motive; as, for instance, if the money had been paid in order to get rid of an actual and *bonâ fide* arrest; but when, as here, it is not clear what effect, if any, the threat of the creditor has produced, it was most material to ascertain what were the motives by which the bankrupt was actuated."¹

A sound practical general rule, towards gathering the just meaning and extent of a *dictum*, seems to be, to confine it to the particular circumstances of the case in which it was spoken. This limitation of a *dictum* is expressly inculcated on the bench, in the following, among other,² instances: "What was said by my brother Ashhurst in the case of *Barry v. Rush*, respecting the admission of assets, must be taken to refer to the particular case then under discussion, but ought not to be extended further:"³ "General language used by the court in giving their opinions in any case must always be understood with reference to the subject-matter then before them:"⁴ "The case of *Farmer v. Arundel*, and *De Grey's* maxim there, is cited: it certainly is very hard upon a judge, if a rule, which he generally lays down, is to be taken up and carried to its full extent. This is sometimes done by counsel, who have nothing else to rely on; but great caution ought to be used by the court in extending such maxims to cases, which the judge who uttered

¹ 7 Bing. 448—450.

² 1 East, 219; 3 East, 124; 1 Barn. and Adol. 586; 4 Barn. and Adol. 76.

³ By Lord Kenyon, 5 Durn. and E. 7.

⁴ By Lord Ellenborough, 3 East, 123.

them never had in contemplation. If such is the use to be made of them, I ought to be very cautious how I lay down general maxims from this bench."¹ "There are some *dicta* certainly which may be relied on; but I think that if they are read, as all such *dicta* ought to be, with reference to the case then before the court, they will be found not applicable to the present subject:"² "The cases which have been cited are no authority for this application: reliance has indeed been placed on some expressions of a general nature occurring in them; but general words, whether uttered by a judge in court, or spoken elsewhere, or published in a treatise, must, on sound principles of logic and criticism, be limited to the subject-matter on which they are employed: the attempt to carry them further only leads to error:"³ "It is always unsatisfactory to abstract altogether the reasoning of the court in any reported case, from the facts to which that reasoning is meant to apply; it has a tendency only to misrepresent one judge, and to mislead another."⁴

[Referring to the case of *Harrison v. Sterry*,⁵ *Rugles*, Chief Justice, in *Hoyt v. Thompson*,⁶ says: "Its meaning as an authority must be qualified by the facts to which it was applied. It was unnecessary for the purposes of that case to state the qualification of the rule asserted, and for that reason probably it was omitted." In *Cohen v. Virginia*,⁷ Chief Justice Marshall remarks: "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be

¹ By Sir J. Mansfield, 5 Taunt. 162.

⁵ 5 Cranch, 312.

² By Alderson, J., 9 Bing. 168.

⁶ 5 N. Y. 344.

³ By Lord Tenterden, 2 Barn. and Adol. 124.

⁷ 6 Wheat. 264; S. C. 5 Curtis' Decisions, 97.

⁴ By Lord Manners, 2 Ball and B. 286.

taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may seem to illustrate it, are considered in their relations to the case decided, but their possible bearing on all other cases is seldom completely investigated.”]

When a proposition is laid down generally, and is meant to be a general proposition applicable to a variety of circumstances, it is important nevertheless to bear in mind, that though as a general proposition it may be right, yet there may be circumstances, which may constitute a case, in which the rule may not be capable of being applied.¹

A *dictum*, as above, it has been observed, is authority; a material, that is, which a judge is bound to, in some degree, regard, in constructing a judgment which he gives. In this work it may, according to circumstances, aid or impede him. And in either case the part devolves on him to measure the just value of it. For this purpose, a fit matter of inquiry may be,—whether the *dictum* or opinion was, on the point in judgment,² in other words, on the point then in question, or only an opinion declared incidentally in the argument of the case,³ or on the point argued before the court, or on which the court pronounced judgment:⁴ or was a *gratis dictum*, without grounds, either

¹ 2 Russ. 333.

³ 1 Stra. 37.

² 5 Maule and S. 185; 2 Ves. Jun. 473; 3 Ves. 630.

⁴ 3 Barn. and Ald. 122.

from reason, or former authorities, to support it;¹ or was an *obiter* saying only;² or was otherwise extra-judicial;³ or is "a mere *dictum*, which has never been followed up;"⁴ or was an opinion at *nisi prius* only;⁵ or is a *dictum* consonant to known practice;⁶ or must be taken to refer to the particular case then under discussion, and ought not to be extended further;⁷ or is a proposition called for by the case in which it was laid down;⁸ or is a doctrine found in another report of the same case, in which that doctrine occurs;⁹ or is a doctrine alluded to or introduced in any subsequent case, to which it would apply;¹⁰ or is an opinion, the contrary to which has been expressly adjudged in more modern times;¹¹ or is a proposition supported by the authority, which the judge quoted for it.¹²

And further, it may be mentioned, that, in considering what weight a *dictum* may be entitled to, it may be material,—to view it in connection with the judicial character of the judge by whom it was made;¹³ also to consider whether the judge who delivered it, has ever expressed an opinion tending a contrary way;¹⁴ and, moreover, in many instances to pause on the accuracy of the reporter.¹⁵ On the latter point, it is observable that Willes, C. J., has said of *obiter dicta*,

¹ 1 Stra. 39.

² 4 Burr. 2068; 5 Barn. and Cr. 556; 2 Younge and J. 379; 1 Ves. Jun. 12, 13; 1 Russ. 48.

³ 5 Barn. and Cr. 576; 3 Russ. 71, 74, 77.

⁴ 1 Turn. and R. 257.

⁵ 1 H. Bl. 53—63.

⁶ 1 W. Bl. 101.

⁷ 5 Durn. and E. 7; 3 East, 123, 124; 1 Barn. and Adol. 586; 2 Barn. and Adol. 124; 4 Barn. and Adol. 76; 5 Taunt. 747; 7 Bing. 448; 9 Bing. 168.

⁸ 5 Taunt. 153, 159.

⁹ 5 Taunt. 747.

¹⁰ 7 Taunt. 671; 1 Younge and J. 399.

¹¹ 2 East, 17; 1 Younge and J. 399.

¹² 3 Barn. and Adol. 673; 3 Russ. 88.

¹³ 5 Maule and S. 185; 5 Barn. and Cr. 556, 576; 7 Taunt. 670, 671, 674; 3 Ves. 630; 1 Meriv. 643.

¹⁴ 3 Russ. 78; 3 Ves. 630.

¹⁵ 5 Taunt. 747; 3 Ves. 630; 19 Ves. 357, 358, 365; 3 Russ. 71.

that, in many cases, they were *nunquam dicta*, but barely the words of the reporters; "for," he adds, "upon examination I have found many of the sayings ascribed to that great man, Lord Chief Justice Holt, were never said by him."¹ To the same inaccuracy Lord Kenyon also bears this testimony,—“I am satisfied that some of the propositions, which are stated in the books, could not have come from the judges to whom they are imputed. As, for example, when Lord Holt is stated to have said, that if one should advise another to charge a person with a bastard, (by which it must be understood that the charge was ill-founded,) it would not be indictable. I do not believe that he said so; for it must be remembered, that such a charge is made upon oath, and he could never have said, that to suborn a witness to commit perjury was no offence, although the perjury was not alleged to have been committed.”²

A general practical observation relative to the value of *dicta*, is,—“We must consider that the *dicta* of judges, stated by reporters upon collateral points, not in judgment before them, are always to be taken with great allowance.”³ And it is Lord Mansfield’s remark,—“It is impossible for any man to take down, in a perfect and correct manner, every *obiter* saying that may happen to fall from a judge, in a long or complicated delivery of his opinion and the reasons of it.”⁴

¹ 1 Ves. Jun. 13.

² 2 East, 17.

³ By Sir R. P. Arden, 2 Ves. Jun. 473.

⁴ 4 Burr. 2068. On the importance, however, of the correctness here mentioned, Lord Eldon has made this observation:—“The case in Atkyns is

material; and, being under the painful necessity of stating an opinion, contradicting the passage in Atkyns, I must observe that it is most important, that *dicta*, not necessary to the decision, should be reported with the strictest accuracy possible.” 19 Ves. 365.

And a universal practical guide to set a just value on *dicta* is, to bear in mind that particular circumstances may augment or lessen their value.

A circumstance, that may augment the value of a *dictum*, may be:—

1. That it is “a deliberate and well-considered opinion.”¹

2. That it is consonant to known practice: “I give credit to the *dictum* of Judge Powys in Viner, not on the authority of the reporter, but because it is consonant to the known practice of Westminster Hall in other cases.”²

3. That it “is not a mere *dictum*, it is a part of the argument; it is a main part of the argument.”³

4. That as authority it has been cited on the bench: “I must confess, that I never before heard that *dictum* cited as an authority; and the only claim, which it has, in my opinion, to that distinction, is the allusion to it by Mr. Justice Holroyd.”⁴

5. That it is an ancient *dictum*, which has in several cases been cited as authority, and no case has determined it not to be law: “I recur to the doctrine in Freeman. . . I am ready to admit that I do not know any case deciding that proposition so largely as it is there stated. . . . If, however, no decision has gone to the extent of the doctrine there stated, it may be also safely affirmed, that no case has determined it not to be law; and it has been cited as authority in almost every case of a charity, that has since occurred. . . . How far that *dictum* in Free-

¹ 3 Bligh's New Rep. 107; 1 Dow and Cl. 378. And see 2 Crompt. and M. 117.

² By Lord Mansfield, 1 W. Bl. 101.

³ 5 Taunt. 159.

⁴ By Hullock, B., 1 Younge and J. 399.

man, from its antiquity of considerable authority, is to be supported, should this [the particular] case be taken to the House of Lords, is another question; but much consideration will be required, before we can come to a conclusion against it at this day."¹ [The majority of the court in *Garrett v. Moule* held that "The view it² suggests is, we think, in accordance with the justice of the case, and it is not, so far as we can find, opposed to any direct decision on the point."]

6. That it is the *dictum* of a judge of great judicial character,³ "That [an opinion of Mr. Justice Heath] is certainly entitled to great weight, as being the opinion of a very able judge:"⁴ "I thought so much respect due to the *dicta* imputed to Lord Hardwicke, as to pause upon the decision of a point, with regard to which he seemed to entertain an opinion different from that with which I was impressed."⁵ [Now, though Lord Ellenborough's view is only a *dictum*, it is valuable, because we happen to know from other cases and from briefs and opinions in those cases which we have seen and read, that he had, in the course of his practice at the bar, been several times engaged in some of the most noted of this class of cases.⁶ The *dictum* seems to have been adopted in the American courts without question, as it agreed with the principles of the common law.⁷ Contrast with this the *dictum* in *Harvey v. Thomas*, 10 Watts, 63, that there existed in the Constitution, no disaffirmance of the power of the Legislature to take the property

¹ By Lord Eldon, 19 Ves. 487, 488.

² The *dictum* in *Wolveridge v. Steward*, 1 C. and M. 644.

³ 5 Barn. and Cr. 576; 7 Taunt. 670, 671, 674; 3 Ves. 630.

⁴ By Littledale, J., 5 Barn. and Cr.

556.

⁵ By Sir W. Grant, 1 Meriv. 643.

⁶ See 5 Law Rep. 693, C. P.

⁷ *Id.* 695.

of an individual *for private use*, with or without compensation, which never found any sanction, and the same judge elsewhere expressed a contrary opinion.^{1]}

A circumstance, that may lessen the value of a *dictum*, may be :

1. That it is void of principle.²

2. That it is extra-judicial :³ "I observe that this was not the point then in question, but only an opinion of Hobart's, declared incidentally in the argument of the case, and, therefore, ought to have the less weight :"⁴ "The point was not in judgment before Lord Holt, and, therefore, the opinion then delivered by him, although entitled to great respect, has not the weight that would belong to a judicial decision of that very learned judge :"⁵ "The opinions of judges, given upon points not before them, have certainly not so much weight, as when the points are before them :"⁶ "The opinion given by Mr. Justice Heath on this subject, in the case of *Bush v. Steinman*, was extra-judicial. It has the weight properly belonging to the opinion of a very learned judge, but it could not be revised, and has not the authority of a judgment."⁷ [*Dicta* upon points not in controversy have little weight.]⁸

3. That is a mere *dictum*, which has never been followed up.⁹

4. That is an *obiter dictum* only :¹⁰ that the words

¹ *Norman v. Heist*, 5 W. and S. 171.

² 11 Ves. 529, 530.

³ 3 Barn. and Ald. 122; 3 Russ. 71, 74; 1 Turn. and R. 257. And see 2 Crompt. and M. 117.

⁴ By Lord Chancellor Cowper, 1 Stra. 37.

⁵ By Lord Ellenborough, 5 Maule and S. 185.

⁶ By Sir R. P. Arden, 3 Ves. 630.

⁷ By Abbott, C. J., 5 Barn. and Cr. 576.

⁸ *The Louisa Bertha*, 14 Jur. 1007; 1 Eng. Law and Eq. 665, 669; *Carroll v. Carroll*, 16 How. U. S. 275.

⁹ 1 Turn. and R. 257.

¹⁰ 4 Burr. 2,068; 5 Barn. and Cr. 556; 2 Younge and J. 379.

"are nothing more than an *obiter dictum*, uttered upon a point totally different from that, which the court had then to decide, and by a judge, who, in the discussion in which he uttered them, was in a minority."¹

5. That it is an opinion at *nisi prius* only:² "The authority in our law, upon which the right to glean is supported, is a *dictum* of Sir Matthew Hale in the Trials per Pais; but though I entertain the highest respect for the authority and character of that great judge, yet it would be doing injustice to his memory, to take every hasty expression of his at *nisi prius*, as a serious and deliberate opinion:"³ "The passage cited from the Trials per Pais contains a *dictum*, but not a judicial opinion, of Sir Matthew Hale. Every one who hears me must acknowledge the impropriety of construing all the conversation, which passes between a judge and the counsel at *nisi prius*, as legal decision."⁴

6. That no such doctrine is to be found in another report of the same case by a learned judge, who joined in the judgment in that case: "It is to be observed, that no such doctrine is to be found in the report of the same case by Mr. Justice Blackstone, who joined in the judgment."

7. That the case did not call for the proposition so generally expressed: "In the case of F. v. A., De Grey, C. J., indeed says, 'When money is paid by one man to another on a mistake either of fact, or of law, or by deceit, this action (of money had and received) will certainly lie.' Now, the case did not call for this

¹ 1 Russ. 48.

² 1 H. Bl. 53, 63.

³ By Lord Loughborough, 1 H. Bl.

⁴ By Wilson, J., 1 H. Bl. 63.

⁵ By Gibbs, C. J., 5 Taunt. 747.

proposition so generally expressed; and I do think that doctrine, laid down so very widely and generally, where it is not called for by the circumstances of the case, is but little to be attended to; at least it is not entitled to the same weight in a case, where the attention of the court is not called to a distinction, as it is in a case where it is called to the distinction.”¹

8. That the doctrine is not referred to in a judgment, in any subsequent case, to which it would apply: “It is very singular, that in no subsequent case is that doctrine ever alluded to, or introduced, though many cases must have occurred, to which it would apply. Possibly the courts have not thought it necessary further to consider a mere *dictum*; but I can find no judgment of any court, in which the court has referred to those *dicta*. In one, and only in one case, do the counsel in argument allude to them, but the court does not notice the argument. In such circumstances, therefore, we are to look to subsequent decisions, and see how far such *dicta*, though coming from so high an authority, have been recognized. On the other hand, we find in previous, as well as in latter decisions, many things which have an aspect the other way.”²

9. That the proposition is not supported by the authority, which the judge quoted for it.³

10. That in the decision of the case, in which the *dictum* occurs, the judge who expressed it was in a minority:⁴ Lord Lyndhurst, estimating such a *dictum*, says, “Reference is made to the *dictum* of Lord Holt, in *G. v. A.* Whether that *dictum* be or be not accurately reported, I will not undertake to say; but in

¹ By Gibbs, J., 5 Taunt. 153.

³ 3 Barn. and Adol. 673; 3 Russ.

² By Gibbs, C. J., 7 Taunt. 671. 88.

See also 1 Younge and J. 399.

⁴ 1 Russ. 48.

the judgment, in which it occurs, Lord Holt differed from the rest of the court, and the decision was contrary to his opinion.”¹

11. That the case, in which the *dictum* is found, is inaccurately reported: Lord Lyndhurst, citing a case on account of a *dictum*, which occurs in the report of the judgment, remarked, “In the first place, this is a mere *dictum*, and was not essential to the decision of the case. It is also to be observed, that the case is most inaccurately reported. As stated in Atkyns, it is unintelligible; and it is only by attending to the correction of it in a note by Mr. Cox,² that we are able to ascertain what the true facts were. I mention this circumstance for the purpose of showing, that in *G. v. K.*, not much reliance can be placed on the accuracy of the reporter.”³

12. That the same judge has expressed an opinion tending a contrary way:⁴ “Here is the opinion of a very learned judge [Lord Hardwicke] not essential to the decision of the particular case, conformable to an opinion said to have been expressed by him in another case, where also it was not essential to the decision. But, in considering what weight these *dicta* are entitled to, it is material to consider, whether the same judge has ever expressed an opinion tending a contrary way. . . . The opinion expressed by Lord Hardwicke [in *B. v. D.*] is at variance with the other *dicta* I have referred to; and, when we are considering to what degree of respect the language, so attributed to that learned judge, is entitled, we are justified in setting the one *dictum* against the other.”⁵

¹ 3 Russ. 87, 88.

⁴ 3 Ves. 630.

² See 1 P. W. ed. Cox, 458, n.

⁵ By Lord Lyndhurst, 3 Russ. 77-

³ 3 Russ. 71.

83.

It remains in conclusion to state, naming an obvious place of a *dictum* in the line of authority, that, generally speaking, it must, as a less authority, give way to a case decided.¹ Lord Mansfield, speaking of a *dictum* in 10 Modern Reports, says,—“The *obiter* saying in 10 Modern (if it was a book of better authority than it is) would signify nothing, when the determinations are the other way.”² And the same learned Lord, with reference to a *dictum* of Chief Justice Holt, observed,—“That is an *obiter* saying only, and not a resolution or determination of the court, or a direct solemn opinion of the great judge, from whom it dropped. . . . This mere *obiter* opinion ought not to weigh against the settled direct authority of the cases, which have been deliberately and upon argument determined the other way.”³ And Lord Kenyon, adverting to an opinion imputed also to Chief Justice Holt, but which opinion he did not believe came from him, added,—“But if he had delivered such an opinion, it is a sufficient answer, that the contrary has been expressly adjudged in more modern times by all the judges, in the case before Mr. Baron Adams at Shrewsbury.”⁴

A last observation that may be made is, that a decision may be right, notwithstanding some *dicta* in it which cannot be supported. Accordingly Lord Ellenborough once had occasion to say,—“I think the case of *M. v. C.* was rightly decided, though perhaps there may be some expressions found in it, which go further than the case required, or the law warranted.”⁵

¹ 7 Taunt. 674; 1 Younge and J.

399; 1 Turn. and R. 257; 3 Russ. 85, 86.

² 1 Burr. 153.

³ 4 Burr. 2068.

⁴ 2 East, 17.

⁵ 2 Maule and S. 50.

A similar remark has fallen from Mr. Justice Chambre,—“The case of *R. v. B.*, is, in the main, right, though some of the points asserted in that case may not be tenable.”¹ [Another instance is the case of *Keller v. Phillips*.² There the question was upon the liability of the husband for necessities supplied to his wife.* In deciding the case, the judge says, the husband is bound to provide for his wife *and family*. The question of providing for the family was not under consideration. It is well settled that there is no analogy between the liability of a husband to support his wife and the liability of a father to support his children. Except by statute in certain cases, a father is not civilly under any legal obligation to maintain his child.³ This error does not detract from the authority of the case upon the liability of the husband for necessities supplied to his wife. Again, it may not detract from the authority of the decision in *Bissell v. Balcom*,⁴ that the opinion refers to *Elmore v. Stone*, 1 Taunt. 458, as an evidence of the law, and without noticing the fact that that case had been repeatedly overruled.⁵]

¹ 4 Taunt. 626.

⁴ 39 N. Y. 281.

² 39 N. Y. 354.

⁵ See *Shindler v. Houston*, 1 N. Y.

³ *Bazeley v. Forder*, 3 Law Rep. 564; Q. B.; *Raymond v. Loyl*, 10 Barb. 483.

268; *Horn v. Palmer*, 3 B. and Ald 321, and 4 Greenl. 381.

CHAPTER VI.

OF THE FOLLOWING ARGUMENTS:—

1. Convenience, Public Policy, and Inconvenience.
2. Analogy.
3. *A Fortiori*, that is, a *Minori ad Majus*, or a *Majori ad Minus*.
4. *Ex Absurdo*.

1. GENERAL convenience is a principle of legal judgment.¹ *Non solum quod licet, sed quid est conveniens est considerandum.*² Convenience may so be used, “not indeed so as to control the law, but as a guide in doubtful cases, and on untrodden ground.”³ Accordingly some cases are met with, in which convenience has been a ground of the decision.⁴ It is Lord Kenyon’s opinion, that convenience “ought to turn the scale, when there are contradictory cases.”⁵

General convenience, or a species of it, is, public policy or consideration; which is a ground of legal judgment.⁶ In a judgment given by Lord Hardwicke, his lordship expressly said,—“Reasons of public benefit and convenience weigh greatly with me, and are a principal ingredient in my present opinion.”⁷

¹ 4 Durn. and E. 243, 245; 1 Taunt. 366; 1 Eden, 230; 1 W. Bl. 166; 3 Barn. and Cr. 156.

² Co. Litt. 66 a.

³ 4 Durn. and E. 243.

⁴ *The King v. St. Catherine’s Hall*, 4 Durn. and E. 233; *Sadgrove v. Kirby*, 6 Durn. and E. 483.

⁵ 6 Durn. and E. 486.

⁶ 5 Barn. and Ald. 287; 3 Barn. and Cr. 156; 3 Bing. 538; 5 Bing. 169; Cas. T. Talb. 142; 3 P. W. 393, 394; 1 Atk. 352; 2 Atk. 136; Ambl. 235; 2 Anstr. 539; 4 Bro. C. C. 124; 3 Madd. 114; 1 Sch. and Lef. 312; 2 Ball and B. 478.

⁷ *Lawton v. Lawton*, 3 Atk. 16.

General inconvenience, or mischief,¹ is a principle of legal judgment.² In Littleton it is common to find law rested on the argument of general inconvenience.³ His learned commentator also constantly acknowledges the force of it;⁴ as where he says, "*Argumentum ab inconvenienti plurimum valet in lege*;"⁵ "An argument drawn from inconvenience is forcible in law;"⁶ "The law, that is the perfection of reason, cannot suffer any thing that is inconvenient."⁷

Many modern authorities acknowledge the force of the argument of inconvenience;⁸ and several cases, ancient and modern, occur where inconvenience has been a ground of the decision.⁹ It finds an appropriate place in new, or doubtful, cases.¹⁰ In them it is a guide "in considering what the law is."¹¹ But inconvenience is not a matter that can avail against settled law.¹² The benches of law and equity concur

¹ Litt. § 434; 3 Co. 79; 1 Dick. 220; 3 Atk. 757.

² 3 Co. 79; 5 Co. 30 b; 3 Barn. and Cr. 156; 7 Taunt. 496; 3 Bing. 590; 1 Dick. 218; 3 Atk. 757; Calvin's case, 7 Co. 4 b, 26.

³ Litt. §§ 87, 138, 139, 231, 269, 434, 440, 478, 665, 722, 730.

⁴ Co. Litt. 261 b; 5 Co. 80 b; 4 Durn. and E. 243; 6 Durn. and E. 486.

⁵ Co. Litt. 66 a.

⁶ Co. Litt. 97, 152 b.

⁷ Co. Litt. 97.

⁸ 5 Durn. and E. 396; 7 Taunt. 496; 3 Brod. and B. 79-81; Cas. T. Talb. 116, 141; 2 P. W. 688; 3 P. W. 394; 2 Ves. Sen. 34; 1 Eden, 230; 1 W. Bl. 165, 166; 2 Atk. 356; 3 Atk. 765.

⁹ Fermor's case, 3 Co. 79, cited 3 Atk. 757, and 1 Dick. 220; Coulter's case, 5 Co. 30; Raynard v. Chase, 1 Burr. 2; Rex v. Stephens, *ibid.* 433; Ball v. Herbert, 3 Durn. and E. 253,

262; The King v. Beeston, *ibid.* 592; Deeks v. Strutt, 5 Durn. and E. 690; Scott v. Scholey, 8 East, 467; Harvey v. Crickett, 5 Maule and S. 336; Blundell v. Catterall, 5 Barn. and Ald. 268, 310; May v. Brown, 3 Barn. and Cr. 113, 131; 4 Dowl. and Ryl. 670; The King v. Mayor of Portsmouth, 3 Barn. and Cr. 152; 4 Dowl. and Ryl. 767; Steel v. Houghton, 1 H. Bl. 51, 61; Compton v. Collinson, *ibid.* 334, 350; Nicholson v. Chapman, 2 H. Bl. 258, 259; Crosby v. Percy, 1 Taunt. 364; Stevens v. Dethick, 3 Atk. 39; Forman v. Homfray, 2 Ves. and B. 329.

¹⁰ 1 H. Bl. 61; 7 Taunt. 527; 1 Eden, 212; 1 W. Bl. 150; 1 Bro. C. C. 165.

¹¹ 3 Barn. and Cr. 131.

¹² 2 Bos. and P. 109, 125; 8 East, 484, 485; 5 Maule and S. 342; 1 Eden, 230; 1 W. Bl. 165, 166; 2 Eden, 184; Amb. 430.

in saying: "In doubtful cases, arguments from inconvenience are of great weight."¹ "The argument *ab inconvenienti*, undoubtedly, is of weight, especially in a new case."² "The argument of inconvenience is of fair application in a new and doubtful case."³ "Arguments of inconvenience are sometimes of great value upon the question of intention. If there be in any deed or instrument equivocal expressions, and great inconvenience must necessarily follow from one construction, it is strong to show that such construction is not according to the true intention of the grantor. But where there is no equivocal expression in the instrument, and the words used admit only of one meaning, arguments of inconvenience prove only want of foresight in the grantor; but because he wanted foresight, courts of justice cannot make a new instrument for him; they must act upon the instrument as it is made."⁴ "In questions, the decision of which depends on the principles of the common law, and which are attended with difficulty and doubt, I have been used to look forward to the consequences which must result from the decision. If great inconveniences will result from one decision, which may be avoided by a different course, I think that the court ought, before it decides, to be satisfied that the law is clear, and that it imperatively calls for a decision which will produce these inconveniences; to this extent only do I suffer the idea of inconvenience to affect my mind."⁵ "If there be any doubts what is the law, judges solve such doubts by considering what will be the good or bad effects of their decision."⁶ "Whatever may be

¹ By Heath, J., 1 H. Bl., 61.

⁴ By Sir J. Leach, 3 Madd. 540.

² By Lord Hardwicke, 1 Dick. 218;
3 Atk. 757.

⁵ By Burrough, J., 7 Taunt. 496.

⁶ By Best, C. J., 3 Bing. 590.

³ By Dallas, J., 7 Taunt. 527.

the effect of the prevailing fashions of the times, I do not think that the argument of inconvenience, arising out of those fashions, can at any time be relied upon against a current of decisions.”¹ “As to inconveniences, if the law is clear, they afford no argument of weight with the judge. The legislature² only can remedy them. They are properly considered only in a case where the court entertains doubts.”³ “Judges must judge according as the law is, not as it ought to be. But then the premises must be clear out of the established law, and the conclusion well deduced, before great inconveniences be admitted for law. But if inconveniences necessarily follow out of the law, only the Parliament can cure them.”⁴ The learned chief justice, who delivered the last-mentioned opinion, says, to the same effect in another case, what Chief Baron Parker pronounces to be the true rule,⁵ that, “Where the law is known and clear, though it be unequitable and inconvenient, the judges must determine as the law is, without regarding the unequity or inconveniency. Those defects, if they happen in the law, can only be remedied by Parliament; therefore, we find many statutes repealed, and laws abrogated by Parliament, as inconvenient, which, before such repeal or abrogation, were in the courts of law to be strictly observed. But, where the law is doubtful, and not clear, the judges ought to interpret the law to be as is most consonant to equity, and least inconvenient. And, for this reason, Littleton, in many of his cases, resolves the law not to be that way which is inconvenient; which Sir Edward Coke, in his

¹ By Lord Eldon, 2 Bos. and P. 109.

² By Lord Northington, 2 Eden, 184; Ambl. 430.

³ See also 2 Bos. and P. 109, 125, and 4 Ves. 332.

⁴ By Vaughan, C. J., Vaugh. 285.

⁵ 1 Atk. 43

comment upon him, often observes, and cites the places." ¹

The weight, and even the existence,² of an inconvenience is sometimes a matter of dispute. And often an inconvenience on one side of a question is balanced by an inconvenience on the other.³ For instance, when, on the construction of a marriage settlement, the question is, whether a daughter's portion is payable in the lifetime of her father; the child may suffer an inconvenience in its obligation to wait for it until that parent's death; and an inconvenience may accrue to the father by his child's independence at the age of twenty-one, or earlier marriage. In the mind of one person, the former of these inconveniences may outweigh the latter of them;⁴ while, in another person's opinion, the latter may outweigh the former.⁵

Sir E. Coke advances so far as to say: *Nihil quod est inconveniens est licitum*.⁶ This doctrine certainly needs some qualification; and a qualification it, perhaps, receives from that learned writer, when he says: "*Quod est inconveniens non permissum est in lege*. An argument *ab inconvenienti* is forcible in law."⁷ "*Argumentum ab inconvenienti est validum in lege, quia lex non permittit aliquod inconveniens*."⁸ "An argument *ab inconvenienti* is forcible in law, and judges are to judge of inconveniences as of things unlawful."⁹ "Here note three things: first, that

¹ Vaugh. 37.

² 7 Taunt. 527, 528.

³ 1 Eden, 210, 211, 212; 1 W. Bl. 149, 150; 3 Madd. 539.

⁴ Greaves v. Mattison, T. Jones, 201, cited 1 Salk. 160, and Cas. T. Talb. 33; Smith v. Evans, Amb. 633—6 Ves. 376—379.

⁵ Reresby v. Newland, 2 P. W. 93; Stevens v. Dethick, 3 Atk. 39—1 P.W. 709; 2 Atk. 356; 1 West Cas. T. Hardw. 435; 6 Ves. 376—379.

⁶ Co. Litt. 66 a, 97, 178 a, 258 b.

⁷ Co. Litt. 178 a.

⁸ Co. Litt. 258 b.

⁹ Co. Litt. 279 a.

whatsoever is against the rule of law is inconvenient ; secondly, that an argument *ab inconvenienti* is strong to prove it is against law; thirdly, that new inventions (though of a learned judge in his own profession) are full of inconvenience, *periculosum est res novas et inusitatas inducere; eventus varios res nova semper habet.*¹ Expressions that tend to show his only meaning to be, that, against the introducing or establishing of a particular doctrine, inconvenience is a forcible argument.

The argument of inconvenience is, under many circumstances, allowed to avail to this extent,—that the law will sooner suffer a private mischief, than a public inconvenience.² *Lex citius tolerare vult privatum damnum quàm publicum malum.*³ “It is better, saith the law, to suffer a mischief that is peculiar to one, than an inconvenience that may prejudice many.”⁴ “It is holden for an inconvenience, that any of the maxims of the law should be broken, though a private man suffer loss; for that, by the infringing of a maxim, not only a general prejudice to many, but, in the end, a public uncertainty and confusion to all, would follow.”⁵

A ground of decision in a modern case was, that, “according to the rule laid down by Littleton and Lord Coke, it is better to submit to a particular inconvenience, than introduce a general mischief.”⁶

[“I can conceive,” says Daly, first judge, “of cases where the operation of the rule would be inequitable and unjust. But it is not our province to legislate,

¹ Co. Litt. 379 a.

² Litt. § 231; Hob. 224; Cas. T. Talb. 116.

³ Co. Litt. 152 b.

⁴ Co. Litt. 97 b.

⁵ Co. Litt. 152 b.

⁶ Emerson v. Lashley, 2 H. Bl. 252.

but to declare the law as we find it.”¹ “It is better he (the defendant) should be quite undone, than that the law should be changed for him.”² “The court cannot depart from a general rule of practice in order to do substantial justice in a particular case.”³ “The mere fact that a rule is inconvenient, is no argument against its justice or propriety, where it is necessary in order to decide according to the very right of the parties.”⁴ And by Bronson, Chief Justice: “Courts of justice should take care that they are not misled by the hardship of a particular case, or by the passion or prejudice which may be excited against a particular individual, to make a precedent which would run counter to well established principles. It should never be forgotten—that a wrong-doer, however great the wrong may be, has not forfeited all his rights—and although the individual may be entitled to no sympathy, care should be taken that the blow which destroys him does not inflict a wound upon justice herself.”⁵ Lord Tenderden is reported to have said, “Hard cases make bad law.” But “the argument *ab inconvenienti* is never of very great weight; of none against the positive injunctions of a statute.”⁶]

2. Analogy is an argument, or guide, in forming a legal judgment,⁷ and very commonly is a ground of

¹ Vermilya v. Austin, E. D. Smith, 203.

² Beaulien v. Fingham, 2 Hen. IV, fo. 18, cited Reddie v. London and N. W. R. R. Co., 4 Ex. (W. H. & G.) 251.

³ Freeman v. Tranch, 21 Law J. R. n. s. C. P. 214; 16 Jur. 1141; 14 Eng. L. & Eq. R. 224.

⁴ Porter v. Miller, 7 Texas R. 468.

⁵ Supervisors of Onondaga v. Briggs, 2 Denio, 32.

⁶ Hogeboom, J., The People v. Super. of Ulster, 32 Barb. 477; see Doe v. Burford, 4 Maule and S. 12.

⁷ 7 Barn. and Cr. 168; 3 Bing. 265; 8 Bing. 557, 563; 3 Atk. 313; 1 Eden, 212; 1 W. Bl. 151; 5 Ves. 675, 676; 3 Swanst. 561; 1 Turn. and R. 103, 338; 1 Russ. and M. 352, 475, 477.

a judgment.¹ See post, Looking to consequence of judgment.

With regard to time, beyond which the courts will not go back to disturb some possession or right, they frequently fix that time by analogy to the point of limitation in an act of Parliament;² as the Statute of Limitations of Actions, 21 James I, c. 16,³ or the Statute 10 William III, c. 14, concerning Writs of Error.⁴

The authority and force of analogical reasoning have been adverted to on the bench in the following terms:—On a question before Sir T. Plumer, this learned judge said,—“I have bestowed considerable time and attention in the examination of this question, but have not been successful in my search after authorities on the subject. It is necessary, therefore, to proceed upon principle, and decisions in analogous cases.”⁵ And in a case relative to presentation to a church, Littledale, J., speaking of the rights of church patronage, says,—“The state of patronage is as much diversified in England as it is possible to be; all classes in the community, that can be enumerated, have patronage belonging to them, and their rights are to be determined by legal principles; and, where there has been no decision or practice or received opinion, then by analogy as far as can be collected.”⁶

¹ Winchelsea causes, 4 Burr. 1962, 2022; *Saunderson v. Rowles*, *ibid.*, 2068; *The King v. Essex*, 4 Durn. and E. 591; *The King v. Lincoln's Inn*, 4 Barn. and Cr. 855, 7 Dowl. and Ryl. 351; *Law v. Law*, Cas. T. Talb. 140, 3 P. W. 391; *Smith v. Clay*, 3 Bro. C. C. 639 n., Amb. 645; *Bonney v. Ridgard*, 1 Cox, 145; *Price v. Lytton*, 3 Russ. 206; *Sanders v. King*, Madd. and Geld. 65.

² *Smith v. Clay*, above.

³ Winchelsea causes, *Smith v. Clay*, and *Bonney v. Ridgard*, above; *Knowles v. Spence*, 1 Eq. Cas. Abr. 315; *Anon.* 3 Atk. 313.

⁴ 4 Burr. 1963; Amb. 648; 3 Bro. C. C. 639, 640, n.

⁵ 3 Swanst. 561.

⁶ 7 Barn. and Cr. 168.

And, in the same case, Best, C. J., said,—“As neither the records of Westminster Hall, nor of the church, furnish any rule or practice to assist me in coming to a decision, I endeavored to find other cases, from which I could safely reason by analogy to that now to be decided.” And he adds,—“In all sciences, analogical reasoning must be pursued with great caution.¹ Minute differences in the circumstances of two cases will prevent any argument from being deduced from the one to the other.”² [And a rule established by a course of adjudications, which is in conflict with legal principles, should not be extended by analogy.³]

3. A further argument, that may be a material of a judgment, is the argument *à fortiori*; namely, *à minori ad majus*, or *à majori ad minus*.

The force of this argument, and, if needful, proof of its authority, may be drawn from Littleton, and his learned commentator. Littleton, in section 418, says,—“If a man will enfeof another without deed of certain lands or tenements, which he hath in many towns in one county, and he will deliver seisin to the feoffee of parcel of the tenements within one town, in the name of all the lands or tenements which he hath in the same town, and in other towns, &c., all the said tenements, &c., pass by force of the said livery of seisin to him, to whom such feoffment in such manner is made; and yet he to whom such livery of seisin was made hath no right in all the lands or tenements in all the towns, but by reason of the livery of seisin, made of parcel of the lands or tenements in one town: *à multo fortiori*, it seemeth good reason that when a man hath title to enter into the lands or tenements in divers

¹ On Caution, see also 1 Russ. and M. 477.

² 3 Bing. 265.

³ Judson v. Gray, 11 N. Y. 408.

towns in one same county, before entry by him made, that by the entry made by him into parcel of the lands in one town, in the name of all the lands and tenements to which he hath title to enter within the same county, this shall vest a seisin of all in him, and by such entry he hath possession and seisin in deed, as if he had entered into every parcel." A comment of Sir Edward Coke on this section is,—"*A multò fortiori*, or *à minore ad majus*, is an argument frequent in our author, and in our books; the force of argument in this place standing thus: if it be so in a feoffment passing a new right, much more it is for the restitution of an ancient right, as the worthier and more respected in law, which holdeth affirmatively, as our author here teacheth us."¹ Again, in section 438, Littleton says,—“If a recovery be by default against such a one as is in prison, he shall avoid the judgment by a writ of error, because he was in prison at the time of the default made, &c. And for that such matters of record shall not hurt him which is in prison, but that they shall be reversed, &c., *à multò fortiori*, it seemeth that a matter in fact, *scilicet*, such descent had when he was in prison shall not hurt, &c., especially seeing he could not go out of prison to make continual claim.” And on this section a comment of Sir E. Coke is,—“Here is an argument, *à minori ad majus* [*à majori ad minus*,]² and the force of our author’s argument is this: If a man in prison shall not be bound by a recovery by default for want of answer in Court of Record in a real action, which is matter of record, (the height and strength whereof hath been somewhat touched,) *à multò fortiori*, a descent in the

¹ Co. Litt. 253 a.

² A correction made in 1 Inst., ed. Hargrave and Butler.

country, which is matter of deed, shall not, for want of claim, bind him that is in prison. And, as the argument *à minori ad majus* doth ever hold (as our author hath already told us) affirmatively, so the argument, *à majori ad minus*, doth ever hold negatively, as our author here teacheth us; and the reason hereof is this, *quod in minori valet, valebit in majori; et quod in majori non valet, nec valebit in minori.*"¹

The argument *à fortiori* appears to be recognized, and to be a ground of the judgment, in two modern cases.²

4. An argument drawn from absurdity, *ex absurdo*, may be a ground of a judgment.³

¹ Co. Litt. 260 a.

² Bartlett v. Hebbes, 5 Durn. and E. 686; King v. Foster, 2 Taunt. 167.

³ Co. Litt. 11 a; Moor v. Black, Cas. T. Talb. 127; Cook v. Duckenfield, 2 Atk. 566.

CHAPTER VII.

OF PRACTICE.

PRACTICE is authority, and a material of a judgment;¹ namely, practice which comes within the description of "settled" practice;² or "the constant current of practice;"³ or "a long continued series of practice;"⁴ or "a long course of practice, sanctioned by professional men;"⁵ or "uniform practice for some length of time."⁶ ["The practice of the court for the course of a court is the law."⁷ "The master tells us that it is every day's practice."⁸ "We find that for forty-five years past it has been the practice to allow the payment in question."⁹ A long settled practice is not to be disregarded, although it may have originated in error.¹⁰]

And this practice, which may be a material of a judgment, may be—"judicial practice;"¹¹ or the practice of pleaders,¹² conveyancers,¹³ or magistrates;¹⁴ or

¹ 7 Durn. and E. 742, 743; 15 East, 226; 3 Maule and S. 5, 6; 1 Brod. and B. 563—566, 595; 2 Brod. and B. 600, 612; 2 Eden, 74; 1 Turn. and R. 75; 2 Russ. 570, 581, 582; 1 Mylne and K. 239, 246.

² 2 Russ. 19.

³ 2 Russ. 570.

⁴ 5 Durn. and E. 380.

⁵ Jacob, 232.

⁶ 1 Younge and J. 167, 168; 2 Crompt. and M. 55.

⁷ Lane's Case, 2 Coke, 16 b.

⁸ Allen v. Carter, 5 Law Rep. 421 C. P.

⁹ Vines v. Brighton R'wy Co., 5 Law Rep. 203 Ex.

¹⁰ The State v. Chase, 5 Har. and J. 303; The State v. Buchanan, *id.* 331.

¹¹ 2 Russ. 19.

¹² 1 East, 210, 211.

¹³ 2 P. W. 690; Ambl. 285, 681; 2 Eden, 64, 74; 1 Durn. and E. 771, 772; Wilm. Notes, 218, 219, 226; 2 Bos. and P. 26; 2 Brod. and B. 574, 575, 599, 611, 612; 4 Ves. 322, 327; 10 Ves. 272; 1 Turn. and R. 86, 87; 3 Russ. 432.

¹⁴ 3 Maule and S. 5, 6; 1 Brod. and B. 563—566.

the practice of a court,¹ or office belonging to a court, as the crown office,² or the master's office.³ [In a case on the year book 29 Edw. III, 47 b. it was stated in the argument that they had heard a certain exception taken amongst the apprentices (law students) in hostels (inns of court).]

A comprehensive opinion of Lord Ellenborough is—"It is not only from decided cases, where the point has been raised upon argument, but also from the long continued practice of the courts, without objection made, that we collect rules of law."⁴ And it is an observation of Lord Eldon, that, "an inveterate practice in the law generally stands upon principles that are founded in justice and convenience."⁵ ["General usage, long continued and hitherto unquestioned, has great force, and the practical construction of the law by so many public officers, though not given upon adverse litigation, must have much of the weight of a judicial decision."⁶]

Uniform practice, of late years, may sometimes be considered as overruling an early decision.⁷ And, *a multo fortiori*, "long contrary usage ought to go a great way towards overturning any old *dictum*."⁸

Lord Eldon sustains a particular jurisdiction of the Court of Chancery in these terms: "It has not been doubted at the bar, that this jurisdiction belongs to the court, and to the individual who sits in it. It is

¹ 4 Burr. 2566, 2570—2572; Wilm. Notes, 96, 97, 102, 264, 330; 1 P. W. 213; 8 Ves. 520; 2 Russ. 581, 582; 1 Russ. and M. 239, 246—248; 1 Sim. and St. 120, 249, 433, 448; 2 Sim. and St. 226; 2 Sim. 33, 86; 2 Younge and J. 4, 5.

² 5 Durn. and E. 380.

³ 1 Sim. and St. 272, 273.

⁴ 15 East, 226.

⁵ Buck, 279.

⁶ Dennis v. Tarpenny, 20 Barb. 377.

⁷ The King v. Kinnear, 2 Barn. and Ald. 467.

⁸ 4 Burr. 2294.

right that the bar should so treat the subject, because (whether it be fit or not that such a jurisdiction should be suffered to remain) I take it to have been long settled by judicial practice, that such is the law of the country; and, when it has been so settled, counsel do not act according to a right view of their duty, if they seek to disturb that settled course of practice. That settled course forms the law of the land; and the judge is bound to follow that law so settled, and to see that it is put into execution.”¹

The authority of the practice of conveyancers, is in a marked manner, insisted on in the following judicial opinions. In *Smith v. The Earl of Jersey*, a case in the House of Lords on a power to lease, Lord Eldon said: “Such have been the habits of my professional life, that I cannot possibly think that we have considered all the authority to be taken into consideration upon this subject. We hear of the practice of conveyancers, and that amounts to a very considerable authority; and I am justified in that assertion by the opinions of the greatest men who have sat in Westminster Hall, who, I am persuaded, in many instances, if matters had been *res integræ*, would have pronounced decisions very different from those, which they thought proper to adopt, if they had not taken notice of the practice of conveyancers as authority.”² In the same case, Lord Redesdale observed: “With respect to what has been said as to general opinions upon the subject, and as to the practice of conveyancing, I cannot agree with much that has dropped; because I do conceive that the law has frequently been decided, even in the construction of acts of parliament, upon what has been the general understanding of lawyers, as to the true

¹ 2 Russ. 19.² 2 Brod. and B. 598.

intention of those acts of parliament; and I will instance such a case under the statute of jointure. Your lordships' house determined, in the case of *Drury v. Drury*, that a rent-charge settled on an infant was, within the statute of jointure, 27 Hen. VIII, c. 10, a good bar of dower; not because such was the literal interpretation of the statute, but because such had been the constant practice of conveyancers and others touching the subject; and it was expressly upon that ground that your lordships' decision at that time went; and I do conceive it is of the utmost importance that your lordships should guide your judgment by that criterion, whenever it can be applied; for, otherwise, all property must be in hazard. It is more especially of importance with regard to marriage settlements. They are ordinarily prepared by those persons who employ their minds in the construction of deeds; and what persons of that description consider to be the law, acted upon for a length of time, and not disputed in courts of law, should be taken to be the general impression upon the minds of lawyers upon the particular subject. How are you otherwise to understand the intent of parties in a settlement, which really and truly is as much, I may say, the view which the person who prepared it has upon the subject, as the view of the parties? for the parties, to a certain degree, are ignorant of the words that are used, unless so far as they are advised by the persons whom they consult; and, therefore, the practice of conveyancers upon subjects of this description is, I conceive, a most important consideration; and, wherever that has prevailed for a great length of time without impeachment in a court of justice, I take, it ought to be considered as a true exposition of the

law.”¹ On another occasion, Lord Eldon repeated his former opinion in these words—“I cannot help saying, what I said in the case of the Jersey leases, that a long course of practice, sanctioned by professional men, is often the best expositor of the law.”² This opinion is reiterated by the same learned judge in a case, which he expressly decided on the practice of conveyancers. His lordship here said: “Whatever other people may say upon the subject, I think that the practice of conveyancers has settled a great deal of law, and if we have got no further than this, that the antecedent practice has been doubted, I should be disposed to abide by that antecedent practice. I put this case, therefore, on the practice of conveyancers; and, after the abuse which I have heard at the bar of the House of Lords, and elsewhere, upon that subject, I am not sorry to have this opportunity of stating my opinion, that great weight should be given to that practice.”³

It remains to notice an opinion of Chief Justice Dallas. The learned judge is, perhaps, to be understood to speak merely of practice that is unsettled. After adverting to the sense of the profession, and a certain objection regarding a lease, he says—“I allow to these topics their weight, and much weight undoubtedly belongs to them; but if, when strictly examined, the practice proves to have crept in against principle, and is not pretended to depend upon any positive authority, I can only say, that, being bound to look at the objection, now that it is made, I must decide upon principle; and if principle and practice

¹ 2 Brod. and B. 611; 7 Price, 523, 524.

² Howard v. Ducane, 1 Turn. and R. 86, cited 3 Russ. 432.

³ Jacob, 232.

are at variance, practice must give way ; and, in this case, as in others, if the mischief be extensive, the proper remedy, if such there be, must be sought for and applied elsewhere."¹ [Each court is the best judge of its own rules, and the Supreme Court will not reverse, for a construction of them, which is not palpably erroneous.²]

¹ 2 Brod. and B. 581.

² *Coleman v. Nantz*, 13 P. F. Smith (Penn.) R.

CHAPTER VIII.

OF LEX MERCATORIA ; THE LAW OR CUSTOM OF MERCHANTS.

A BODY of laws, which govern some commercial transactions, is called the Law or Custom of Merchants,¹ or *Lex Mercatoria*.²

A part of this body is peculiar to England, and so far as it is not created by statute, as *Magna Charta*,³ or the statutes *De Mercatoribus*,⁴ or of the Staple,⁵ is a part of the common law of the country.⁶ And it includes law relative to merchant ships and seamen.⁷

Another part of the same body is a foreign law, which the common law of England often in some degree regards,⁸ and sometimes adopts by incorporating it in itself.⁹

With respect to the *Lex Mercatoria* peculiar to England, and which is a part of the common law of the country, it is observable that this law shares the nature of other branches of the common law. As, for example, a vast proportion of the law of real property has originated in the practice of landed proprietors, namely, in their deeds and wills, the dispositions

¹ Winch, 24; 2 Burr. 692; 3 Burr. 1669; 1 W. Bl. 299; 1 Bl. Com. 75; Co. Litt. 11 b.

² 1 Inst. 11 b, 182 a; 2 Inst. 58; Hale's Hist. Com. L., ch. ii, ed. 1820, p. 23; 1 Bl. Com. 75; 2 Burr. 1228.

³ 9 Hen. III, c. 30; 2 Inst. 57.

⁴ 11 Edw. I; 13 Edw. I, st. 3, c. 1.

⁵ 27 Edw. III, stat. 2, c. 1; 27 Edw. III, st. 2, c. 9; 4 Inst. 237.

⁶ 1 Inst. 182 a; 2 Inst. 58; Hale's

Hist. Com. L., ch. ii, ed. 1820, p. 23; 1 Bl. Com. 75; Winch, 24; 2 Burr. 1225, 1226, 1227, 1228; 3 Burr. 1669; 1 W. Bl. 299; 7 Durn. and E. 210; 1 Meriv. 564.

⁷ Cutter v. Powell, 6 Durn. and E. 320; and see 2 Burr. 692 and 887.

⁸ 3 Barn. and Ald. 405; 5 Barn. and Ald. 478, 480.

⁹ 1 Meriv. 564; 5 Barn. and Ald. 478, 480.

made in which, the courts sometimes confirm, stamping them with the authority of law,¹ and at other times declare to be invalid;² so, in like manner, a large proportion of the mercantile law has originated in the practice of merchants, namely, in their commercial transactions,³ of which the courts have upheld some, and invalidated others.⁴ The practice of landed proprietors, that is so upheld, is law:⁵ and the practice of merchants, that is so sustained, likewise is law.⁶ And as conveyancing practice, when by long prevalence settled, is law;⁷ so commercial practice, when so settled, is law, too.⁸ But as it is not every practice in conveyancing, that is valid, as, for example, the common attempt to create a perpetuity;⁹ so it is not every commercial practice that is valid.¹⁰ Merchants introduce a practice: it is the courts only which can determine its legality.¹¹ Until this practice or usage is judicially determined to be law, the courts admit evidence of it.¹² But this evidence is not admissible, after such judicial determination;¹³ in other words, after "the law is already settled."¹⁴ On litigated questions, which involve, or relate to, commercial

¹ The Duke of Norfolk's case, 3 Ch. Cas. 1, 2 Swanst. 454; Thellusson v. Woodford, 4 Ves. 227, 11 Ves. 112.

² Duke of Marlborough v. Earl Godolphon, 1 Eden, 404, 3 Br. P. C., ed. Toml. 232.

³ 7 Durn. and E. 210.

⁴ *Ibid.*

⁵ Duke of Norfolk's case, and Thellusson v. Woodford, above.

⁶ Edie v. East India Comp., 2 Burr. 1216, 1 W. Bl. 295.

⁷ 2 Brod. and B. 599, 611, 612; 1 Turn. and R. 86, 87; 3 Russ. 432. And see the preceding chapter.

⁸ Edie v. E. I. Comp., above. 6

Durn. and E. 324; 1 M'Clel. and Y. 190, 191.

⁹ Duke of Marlborough v. Earl Godolphon, above; Seaward v. Willock, 5 East, 198.

¹⁰ 7 Durn. and E. 210.

¹¹ 2 Burr. 1224, 1226, 1228; 7 Durn. and E. 210.

¹² Cutter v. Powell, 6 Durn. and E. 320; Winch, 24; 1 M'Clel. and Y. 190, 191; 2 Dow and Cl. 168; 2 Bligh's New Rep. 157.

¹³ Edie v. East India Comp., above; 3 Burr. 1669; 2 Dow and Cl. 168; 2 Bligh's New Rep. 157.

¹⁴ 2 Burr. 1222, 1224, 1225, 1226.

transactions, a usage of merchants is a guide, which the courts take in ascertaining the judgment, which it is their duty to give;¹ and to most mercantile usages they avow extreme respect.²

[The court will conform to a principle of mercantile law established throughout the world, rather than follow a decision, which is a palpable and probably injudicious innovation upon that principle.³]

Some of the above propositions, relative to the *Lex Mercatoria* peculiar to England, are sustained by the following judicial opinions:—In a case at *nisi prius* before Lord Kenyon, witnesses were called to prove, that it was the constant usage and course of trade for wharfingers to have a lien upon goods in their possession, for their general balance. Lord Kenyon held that, that being the case, he was bound to take it to be the clear and settled law of the land; because the usage of trade constitutes the recognized law of the land, and the law would adopt it, and adopt it upon this plain principle, that when there is a prevalent and universal course and usage of trade, all mankind are deemed to contract upon the scale, footing, and foundation of that established course and practice.⁴ And in a case, where on the trial evidence of a custom of merchants was permitted to be given, and where on a motion for a new trial the court held that the evidence ought not to have been admitted, different judges of that court expressed the following opinions:—"I am very clearly of opinion, that I ought not to have admitted any evidence of the particular usage of merchants in such a case. Of this, I

¹ *Cutter v. Powell*, 6 Durn. and E. 320.

² *And v. Magruder*, 10 Cal. 282.

³ 1 M'Clel. and Y. 190. See *Naylor*

⁴ 6 Durn. and E. 324, 326; 1 M'Clel. and Y. 191. *v. Mangles*, 1 Espin. 109.

say, I am now satisfied; for the law is already settled. . . . The point now in question has been already solemnly settled both in the Court of King's Bench and Common Pleas, by the two adjudications that have been mentioned: and therefore witnesses ought not to have been examined to the usage, after such solemn determinations of what was the law:"¹ "Much has been said about the custom of merchants, but the custom of merchants, or law of merchants, is the law of the kingdom, and is part of the common law. People do not sufficiently distinguish between customs of different sorts. The true distinction is, between general customs, which are part of the common law, and local customs, which are not so. This custom of merchants is the general law of the kingdom, part of the common law; and therefore ought not to have been left to the jury, after it has been already settled by judicial determinations:"² "The custom of merchants is part of the law of England; and courts of law must take notice of it, as such. There may indeed be some questions depending upon customs amongst merchants, where, if there be any doubt about the custom, it may be fit and proper to take the opinion of merchants thereupon; yet that is only where the law remains doubtful. And even there the custom must be proved by facts, not by opinion only; and it must also be subject to the control of law. . . . These judicial determinations of the point are the *Lex Mercatoria*, as to this question; for they settle what is the custom of merchants; which custom is the *Lex Mercatoria*, which is part of the law of the land. But this finding of the jury in the present case is directly

¹ By Lord Mansfield, 2 Burr. 1222, 1224; 1 W. Bl. 298.

² By Foster, J., 2 Burr. 1225; 1 W. Bl. 299.

contrary to the *Lex Mercatoria*, so fully settled and established by legal adjudications.”¹

On litigated questions, which involve or relate to commercial transactions, a foreign law or custom of merchants is often a guide, which the courts use in ascertaining the judgment, which it is their duty to give. And to know this law, or custom, the habit of the courts is, to consult foreign writers on commercial law. Writers often so referred to are,—Emerigon,² and Pothier.³ The judicial respect due to these, and other foreign writers, may be learnt from the following opinions delivered on the Bench.⁴ Lord Ellenborough characterizes Pothier, as “a most learned and eminent writer upon every subject connected with the law of contracts, and intimately acquainted with the law-merchant in particular.”⁵ In a case on a policy of ship-insurance, Best, J., saying the particular question was new in the courts of this country, then stated,—“In the absence of all authority, we must put that construction upon the contract of assurance, which is most agreeable to justice. French policies are nearly similar to those used in this country. As learned French writers, and the tribunals of France, have put a construction upon their policies, in cases like the present, we may avail ourselves of their opinions and decisions, to assist us in deciding on the policy now under our consideration.”⁶ And in a later case, which arose on a bill of exchange, Abbott, C. J., admitted the respect due to foreign commercial law, and foreign

¹ By Wilmot, J., 2 Burr. 1227, 1228, 1 W. Bl. 300.

² His *Traité des Assurances*, 5 Maule and S. 465; 2 Barn. and Ald. 81, 82, 83; 3 Barn. and Ald. 402, 403, 406; 2 Crompt. and J. 251.

³ 16 East, 395–398; 3 Barn. and

Ald. 402, 406; 5 Barn. and Ald. 480, 481; 2 Bos. and P. New Rep. 300.

⁴ See also 2 Burr. 889, and 6 Durn. and E. 422.

⁵ 16 East, 398.

⁶ 3 Barn. and Ald. 405.

writers, and in particular to Pothier, in these terms:—
“In a case like the present, which depends on the law-merchant, the opinions of learned lawyers and the practice of foreign and commercial nations, though they cannot, strictly speaking, be quoted as authorities here, yet are entitled to very great weight and attention. When I find, therefore, that it is laid down in Pothier’s treatise, that a party, who has given an acceptance, may erase it before the bill goes out of his hands, it affords a strong argument in support of the view which I take of the question.”¹ And, in the same cause, Best, J., observed in equally explicit language,—“This is a question on the law-merchant, and it is desirable that that law should be the same in this as in every other commercial country. We ought, sitting here, to act according to the judgments of the courts in our own country; but, in the absence of these authorities, we may, with great advantage, take into our consideration the opinions of learned writers on this point. . . . The authority of Pothier is expressly in point. That is, as high as can be had, next to the decision of a court of justice in this country. It is extremely well-known, that he is a writer of acknowledged character; his writings have been constantly referred to by the courts, and he is spoken of with great praise by Sir William Jones in his *Law of Bailments*, and his writings are considered by that author equal in point of luminous method, apposite examples, and a clear manly style, to the works of Littleton on the laws of this country. We cannot, therefore, have a better guide than Pothier on this subject.”²

¹ *Cox v. Troy*, 5 Barn. and Ald.

² 5 *Id.* 480.

CHAPTER IX.

OF THE CIVIL LAW.

A BODY of Roman law, or *Corpus Juris Civilis*, compiled under the auspices of the Emperor Justinian, consists of, 1. The elements or first principles of the Roman law, and called the Institutes; 2. Opinions and writings of eminent lawyers, digested in a systematical method, and named the Digests or Pandects; 3. A code, or collection of Imperial Constitutions; and 4. The Novels, or New Constitutions, posterior in time to the other code, and amounting to a supplement to that code, and containing new decrees of successive Emperors, as new questions happened to arise.¹ This body constitutes the law, distinctively named the Civil Law; by the civil law, absolutely taken, is generally understood the civil or municipal law of the Roman empire, as comprised in the Institutes, the Digests, the Code, and the Novels or New Constitutions.² This law is a branch of the law of England; namely, so far as it has been admitted and received by immemorial usage and custom, in some particular cases, and some particular courts;³ or so far as it may have been introduced by consent of Parliament.⁴ But it is no further

¹ 1 Bl. Com. 81.

² 1 Bl. Com. 80; Burn's Eccl. Law, Pref.

³ Hale's Hist. Com. L. ch. ii; Co. Litt. 11 b; 1 Bl. Com. 14, 15, 80; 3 Bl. Com. 87; 1 Lord Raym. 363; 1

Atk. 486; 1 West's Cas. T. Hardw. 117, 317; 1 Dick. 172; 2 Ves. Sen. 437-443; 4 Bro. C. C. 292, 293.

⁴ Hale's Hist. Com. L. ch. ii; 1 Bl. Com. 80; Willes, 544.

a part of the law of this country :¹ "The civil law is no part of the law of England, any further than it has been received here ; and this with regard to personal estate."² A portion of the civil law is received in our ecclesiastical and admiralty courts.³

In the courts of Westminster Hall, the civil law is, as authority, received in a few particular instances.⁴ Some of these instances are the cases, in which the ecclesiastical courts have admitted the civil law, and in the like cases the temporal courts are guided by the same law,⁵ "that there may be a uniformity of judgments in the different courts."⁶

An example of this uniformity is, the case of a legacy which, out of personal estate, is bequeathed to a person, to be paid at a future day ; a case where, by the civil law, the legacy is not lost by the death of the legatee before the day of payment ; a rule that is received in the ecclesiastical courts, and is adopted by the Court of Chancery.⁷ In other instances of legacies, given out of personal estate, the temporal courts have followed the civil law ;⁸ as, where a personal chattel is bequeathed to A. for life, and after his death to B. ;⁹

¹ Hale's Hist. Com. L. ch. ii ; 1 Bl. Com. 14, 15, 79, 80 ; 3 Bl. Com. 87 ; 1 Lord Raym. 363 ; Willes, 93, 94, 544 ; 5 Barn. and Adol. 25 ; 1 Atk. 501 ; 1 Dick. 172 ; 2 Ves. Sen. 437-443.

² By Lord Hardwicke, 3 Atk. 764.

³ Hale's Hist. Com. L. ch. ii ; Co. Litt. 11 b ; 1 Lord Raym. 363 ; 1 West's Cas. T. Hardw. 27, 28, 317 ; 1 Atk. 296, 376 ; 3 Atk. 331, 346 ; 1 Wils. 131 ; 3 Ves. 96 ; 5 Madd. 356, 360.

⁴ 1 Atk. 374, 375 ; 5 Durn. and E. 58, 59.

⁵ 1 Atk. 376 ; 3 Atk. 346 ; 1 Wils.

131, 132 ; 3 Ves. 96, 139 ; 5 Madd. 356, 360 ; 1 Sch. and Lef. 11 ; 1 W. Bl. 264 ; 2 Burr. 1087.

⁶ 1 Atk. 486 ; 3 Atk. 346 ; 1 Wils. 132 ; 3 Ves. 96 ; 1 W. Bl. 264 ; 2 Burr. 1087.

⁷ 1 West's Cas. T. Hardw. 317 ; 1 Atk. 486 ; 6 Ves. 245, 246.

⁸ 1 Wils. 132 ; 3 Atk. 346 ; 3 Ves. 96 ; 6 Ves. 243-246 ; 1 Meriv. 404, 505 ; 5 Madd. 356, 360 ; 1 Sch. and Lef. 11 ; 1 W. Bl. 264.

⁹ Hyde v. Parratt, 1 P. W. 1 ; 2 Vern. 331.

where double legacies are bequeathed;¹ and where to a legacy a condition of marriage with consent is annexed, and there is not a bequest over, on breach of the condition.² From the civil law, "we borrow all, or at least the greatest part of, our rules upon legacies."³

In other cases, the civil law has been adopted by the temporal courts,⁴ as, the maxim *ex nudo pacto non oritur actio*;⁵ and, probably, some rules, by which, the application of indefinite payments, made by a debtor to his creditor, is to be governed.⁶ And with regard to the adoption of the civil law, it may, as a general rule, be laid down, that "whether or not it has been adopted by the common law, is to be seen by looking into our books."⁷

When the civil law is received in the ecclesiastical courts, the temporal courts, in observing the same law, do not always adhere to it to the extent, in which it is followed by the former courts. By the civil law, if to a legacy given out of personal estate is annexed a condition of marriage with consent, and, on breach of the condition, the legacy is bequeathed over, here, notwithstanding the bequest over, the condition added to the legacy is void.⁸ And the same law is observed in the ecclesiastical courts of this country.⁹ In, however, the temporal courts here, the civil law is followed

¹ Duke of St. Alban's v. Beaucherk, 2 Atk. 636; Hooley v. Hatton, 2 Dick. 461.

² 1 Atk. 374, 375, 376; 3 Atk. 331; 1 Wils. 131; Willes, 93-96; 2 Dick. 717-724; 2 Bro. C. C. 487; 3 Ves. 95-98; Hervey or Harvey v. Aston, 1 West's Cas. T. Hardw. 350; 1 Atk. 361.

³ 6 Ves. 243; 14 East, 604.

⁴ 1 P. W. 777; 1 Meriv. 312; 5 Durn. and E. 58, 59.

⁵ 3 Burr. 1670, 1671; 2 Bl. Com. 445.

⁶ 1 Meriv. 605, 606.

⁷ 3 Durn. and E. 263; 1 Dick. 172; 2 Ves. Sen. 441; 3 Bl. Com. 87.

⁸ 1 Wils. 131; 3 Atk. 332; 1 West's Cas. T. Hardw. 366.

⁹ 3 Atk. 331, 332. See 1 West's Cas. T. Hardw. 360.

so far only, that the condition is void, if there is not that bequest over: on the contrary, if the legacy is so bequeathed over, and the condition is broken, such condition is not void, and the ulterior bequest will take effect.¹ Thus, Lord Hardwicke, speaking in the Court of Chancery, says,—“The civil law makes such conditions void, notwithstanding the legacy be given over, as to pious uses, or for manumission, &c.”² And again, “It is an established rule in the civil law, and has long been the doctrine of this court, that where a personal legacy is given to a child on condition of marrying with consent, that this is not looked on as a condition annexed to the legacy, but as a declaration of the testator *in terrorem*. This rule is so strictly adhered to in the ecclesiastical court, that the marrying without consent is not considered there as a breach of the condition, although the legacy is actually given over; but that rule has not been carried so far in this court, for in many instances here it has been considered as a breach of the condition, and the legacy thereby forfeited.”³

In a case in the Court of Chancery, reasoning may be taken from the civil law, when the same case might have occurred in an ecclesiastical court.⁴ Accordingly, on a question relative to a *donatio mortis causâ*, Lord Loughborough expressly said,—“I have looked into the cases, of which there have been several upon this question. The reasoning is generally taken from the civil law; and with great propriety; because the jurisdiction, in which these cases may as well occur as here, is the Ecclesiastical Court, which has properly followed the reasoning of the Roman law.”⁵

¹ 1 Atk. 376; 3 Atk. 331; 1 Wils.

³ 3 Atk. 331.

² 131; *Hervey v. Aston*, above.

⁴ 4 Ves. 808.

³ 1 Wils. 131.

⁵ 2 Ves. Jun. 118.

In a case where counsel relied on the express terms of the rule of the civil law, which says, that, "where no evidence is to the contrary, a child shall be presumed to have outlived its parent," as affording reasonable grounds for presumption, to be adopted by our own courts of justice under similar circumstances; Sir W. Grant, not adopting that rule, observed,— "There are many instances, in which principles of law have been adopted from the civilians by our English courts of justice; but none that I know of, in which they have adopted presumptions of fact from the rules of the civil law."¹

On the civil law, it may lastly be mentioned, that sometimes it may be cited, not as authority, but as the opinions of learned men. Lee, Chief Justice, taking occasion so to cite it, observed,— "Though no judicial determination, yet I may cite a civil law authority, as Dom. lib. I, fol. 155, concerning partnership, though not as authority on which a judgment is to be founded in our courts; yet, as said by Lord Raymond, may they be used as the opinions of learned men."²

[It is admitted by Sir Matthew Hale³ that the common law was greatly improved during the reign of Henry III, in the time of Bracton, who was chief justice during that monarch's reign. "This improvement," said Best, Chief Justice, in delivering judgment in the House of Lords in the case of *Gifford v. Lord Yarborough*,⁴ was made by incorporating much of the civil law with the common law. We know that many of the maxims of the common law are borrowed from the civil law, and are still quoted in the language of the civil law. Notwithstanding the clamor raised by

¹ *Mason v. Mason*, 1 Meriv. 308.

² 1 Ves. Sen. 370; 1 Atk. 181.

³ Hist. Com. Law, ch. vii.

⁴ 5 Bing. 167.

our ancestors for the restoration of the laws of Edward the Confessor, I believe that these and all the Norman customs which followed would not have been adequate to form a system of law sufficient for the state of society in the reign of Henry III. Both courts of justice and law writers were obliged to adopt such of the rules of the civil law as were not inconsistent with our principles of jurisprudence." Mr. Spence, in his "Inquiry into the Origin of the Laws of Modern Europe," has a passage to the same effect.¹

[The extent to which the civil law has been incorporated with the common law, was attested by Lord Chief Justice Holt in *Lane v. Cotton*,² as thus: "The principles of our law are borrowed from the civil law, and therefore, in many things, grounded on the same reason." And Sir William Jones remarked, "That though few English lawyers dare make such an acknowledgment, yet the civil law is the true source of nearly all our English law that is not of feudal origin."³ The reason of the obstinate reluctance on the part of our English ancestors to acknowledge the obligations of the common law to that of imperial Rome is well known to the merest tyro in English history. The bishops and clergy in early times, many of them foreigners, applied themselves wholly to the study of the civil and common laws, while the nobility and laity adhered with equal pertinacity to the old common law. "Both of them," says Blackstone, "reciprocally jealous of what they were unacquainted with, and neither of them, perhaps, allowing the opposite system that real merit which is abundantly to be found in each." Upon this Mr. Christian observes,—"Though

¹ Pages 539, 540.

² 12 Mod. 482.

³ Lord Teignmouth's Life of Sir W. Jones, vol. II, p. 168.

the civil law, in matters of contract and the general commerce of life, may be founded in principles of natural and universal justice, yet the arbitrary and despotic maxims which recommended it to the Pope and the Romish clergy rendered it odious to the people of England." At the present day, however, the noble reasonings and principles of the civil law on the subject of private rights and wrongs are continually cited in the courts: "Not being acknowledged," to adopt the language of Lord Stair, speaking of its reception in the law of Scotland, "as a law binding for its authority, but being followed as a rule for its equity."¹

[It is a noticeable peculiarity in the "*Reports tempore Finch*," that in all cases where the rule laid down or relied on by the judge differs from the corresponding rule of the civil law, the difference is noted in the margin.

[The civil law is not authority in America.²

["The Roman law forms no rule binding in itself on the subjects of these realms; but in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion, at which we have arrived, if it prove to be supported by that law."³

[The case of *Silisbury v. McCoon*⁴ was decided below upon the ground that a certain rule of the civil law had not been adopted into the common law, but in the court above it was held, by the majority of the court, that the rule of the civil law had been adopted, and that it controlled the case.

¹ Instit. b. I, tit. i, § 12.

² *Fable v. Brown*, 2 Hill's Ch. 378.

³ Tindal, Chief Justice. *Acton v.*

Blundell, 12 M. and W. 324.

⁴ 3 N. Y. 379.

[Lord Campbell, in his "Lives of the Chancellors,"¹ in detailing the defects of Lord Eldon as a chancellor, says,—“Could he have combined with his own stores of professional learning, his brother, Lord Stowell’s profound knowledge of the civil and canon laws, of the Law of Nations, and of the codes of the Continental States, he would have been the most accomplished judge who ever sat on any British tribunal. But while he was reading ‘Coke upon Littleton’ over and over again, and becoming thoroughly versed in all the doctrines laid down by chief justices and chancellors in Westminster Hall, we are not told that he ever dipped into the Code, the Pandects, or the Institutes of Justinian, or that he found any pleasure in Puffendorf or Grotius, or that he ever formed the slightest acquaintance with D’Aguesseau or Pothier. Nor in any of his arguments at the bar or judgments from the bench, does he, so far as I am aware, ever refer to the civil law, or any foreign writer, as authority, or by way of illustration. Considering that our system of equity is essentially derived from the civil law, when any doubtful question in it arises, we rejoice to see it traced to its source. Sir William Grant—*sanctos ausus recludere fontes*—by this practice gives force and beauty to his judgments.” Sir Edward Sugden, in his treatise on the Law of Vendors and Purchasers, commenting on the case of *Paine v. Mellor*,² says,—“Lord Eldon’s decision exactly accords with the doctrine of the civil law. Indeed, this very case is put in the Institutes.” Lord Campbell, in noticing this, says there is no reason to think that Lord Eldon took his doctrine from the civil law, and that “indeed, he proceeds upon different reasoning.”]

¹ Vol. X, ch. ccxiii.

² 6 Ves. Jun. 349.

[“I have not the smallest scruple to assert,” says Dr. Halifax,¹ “that the student who confines himself to the institutions of his own country, without joining to them any acquaintance with those of imperial Rome, will never arrive at any considerable skill in the grounds and theory of his profession.

[It is now universally conceded that a competent knowledge of the principles of the Roman law is indispensable to the student of English or American law, and accordingly the literature on the subject has multiplied greatly. We give a few titles:

[Savigny’s Treatise on Possession, or the *Jus Possessionis* of the Civil Law. Translated by Sir Erskine Perry.

[Savigny’s System of the Modern Roman Law. Translated by William Holloway, Judge of the High Court at Madras.

[Institutes of Justinian, with English Introduction. Translation and Notes by Thomas C. Sandars, M. A. Also, the same Institutes, translated by Cooper.

[The Commentaries of Gaius. Translated, with Notes, by J. T. Abby, LL. D. *Regius* Professor of Law in the University of Cambridge, and Bryan Walker, M. A., M. L. Also, Commentary of Gaius, with English Translation, by Tompkins and Lemon. (1869.)

[A Compendium of the Modern Roman Law. By Frederick J. Tomkins, Esq., M. A., D. C. L., and Henry D. Jencken, Esq.

[The History of the Roman Law from the Text of Ortolan. By Iltudus S. Prichard, Esq., F. S. D., and David Nasmith, Esq., LL. B.

¹ Analysis of the Civil Law, Pref. 22.

[Bracton, and his Relation to the Roman Law. By Guterbock. (1866.)

[Colquhoun. Summary of Roman Civil Law. (1849-1860.)

[Cushing. Introduction to the Study of the Roman Law. (1854.)

[Grapel. Sources of the Roman Civil Law, (1857,) and Institutes of Justinian. (1855.)

[Leapingwell. Manual of Roman Civil Law. (1859.)

[Mackenzie's Studies in Roman Law. (1870.)

[Phillimore. Introduction to the Study and History of the Roman Law (1848), and Private Law among the Romans. (1863.)]

A very masterly and elaborate account of the Civil Law is to be found in the forty-fourth chapter of Gibbon's *Decline and Fall of the Roman Empire*. Lord Mansfield characterized it as "beautiful and spirited." See also Chancellor Kent's *Review of the Civil Law*. Lecture xxiii of vol. I

of his *Commentaries*. "But that to which I mainly ascribe the brilliancy of the career on which he [Lord Hardwicke] was entering, was the familiar knowledge he acquired of the Roman Civil Law." VII *Camp. Lives of the* Chanc. ch. cxxxi, p. 192.

CHAPTER X.

OF THE CANON LAW.

THE canon law is a body of law, made by the Roman and English clergy.¹ The authority of, and power to make, it in England, is governed by the statute 25 Henry VIII, ch. xix., revived and confirmed by the statute 1 Elizabeth, ch. i.² Certain constitutions and canons were made in the convocation of the province of Canterbury, in the year 1603, and ratified by the king, James I; which were also received and passed, about two years after, in the province of York.³ These canons bind, it appears, the clergy;⁴ but where they are not merely declaratory of the ancient canon law, but are introductory of new regulations, they, because they have not been confirmed in Parliament, do not bind the laity.⁵ On delivering the judgment of the court of King's Bench, in a case decided on great consideration, Lord Hardwicke thus expressed the opinion of the court:—"We are all of opinion, that

¹ Hale's Hist. Com. L. ch. ii; Burn's Eccl. L. Pref.; 1 Bl. Com. 82, 83. Generally on the Canon Law, see 4 Vin. Abr. tit. Canon's; Hale's Hist. Com. L. ch. ii; Reeves' Hist. vol. I, ch. ii; vol. IV, ch. xxiv, xxv; Spelman's Original of the Terms, ch. viii; Doct. and St. Dial. I, ch. vi; The Resolutions concerning a Convocation, 12 Co. 72; Caudrey's case, 5 Co. I; and Middleton v. Croft, 2 Atk. 650.

² 1 Bl. Com. 83; Burn's Eccl. L., Pref.; 2 Atk. 660, 661.

³ Burn's Eccl. L., Pref.; 1 Bl. Com. 83; 2 Atk. 158, 652, 653.

⁴ 1 Bl. Com. 83; Burn's Eccl. L., Pref.; 1 Salk. 134; 12 Mod. 238; 1 Lord Raym. 449; 2 Atk. 158, 653, 665.

⁵ 1 Bl. Com. 83; Burn's Eccl. L., Pref.; 6 Mod. 190; 1 Lord Raym. 449; 2 Atk. 158, 653; Middleton v. Croft, 2 Atk. 650, 2 Stra. 1056; 4 Vin. Abr. 320; 2 Barnard. K. B. Rep. 351.

the canons of 1603, not having been confirmed by Parliament, do not *proprio vigore* bind the laity; I say *proprio vigore*, by their own force and authority; for there are many provisions contained in these canons, which are declaratory of the ancient usage and law of the Church of England, received and allowed here, which, in that respect, and by virtue of such ancient allowance, will bind the laity; but that is an obligation antecedent to, and not arising from, this body of canons.”¹

In a case where, in argument, counsel had resorted to the canon law, Lord Kenyon thus spoke of the authority of this law:—“The canon law has been referred to, as if all the canons were part of the law of the land: but those canons only that have already been incorporated into our law, are considered as part of the law of England. Some of the canons, indeed, mentioned in Linwood, have been so incorporated: but whether or not the canon, that has been cited from that book, has been received into our law, may be known by referring to our statutes.”² “The whole canon law,” says Sir J. Nicholl, “rests for its authority in this country upon received usage; it is not binding here *proprio vigore*.”³ In a late case which involved much ecclesiastical law, and underwent great discussion and consideration in different courts, Best, C. J., laid down these general propositions:—“Where the ecclesiastical law does not contravene the law of England, it is adopted into that law, and is to be followed by the temporal courts in the decisions of such cases as are within its influence. . . . If it be said,

¹ 2 Atk. 653.

³ 3 Barn. and Ald. 245.

² 8 Durn. and E. 414. See also 1 Bl. Com. 14, 15.

what have the judges of the common law, when giving judgment in an action of *quare impedit*, to do with the canon law? I answer, that where the right of presentation is derived from the church, it can only be decided by the canon law. Lay advowsons were attached to manors, and the right of presentation to these could only be decided by the common law, as they followed the rights of the manors to which they were annexed, and which manors were the creatures of the common law. But ecclesiastical presentations having no connection with lay property, but, existing only as rights of the church, are governed only by the laws of the church. The ecclesiastical law is for the decision of such questions, and must be taken notice of by the judges of the courts of common law in deciding them, (*Edes v. The Bishop of Oxford*, Vaughan's Reports, 21 and 24.) Tithes are a spiritual right, and as such they were originally recoverable only in the ecclesiastical courts. Actions may now be brought for subtraction of tithes in the courts of common law; and tithes may now be recovered in a court of equity; but these courts, in deciding what tithes are due, and how they ought to be set out, consult the ecclesiastical law. There are now, indeed, so many decisions of the courts of Westminster on the subject of tithes, that it is seldom necessary to have recourse to the canonist; but if a case occurred, for the decision of which our reports contain no precedents, the common law or equity judges must look to the canons and customs of the church, and must be governed by them in the decision of such a case."¹

[It is stated in Warren's Law Studies, that the English ecclesiastical law has never been introduced

¹ *Rennell v. Bishop of Lincoln*, 3 Bing. 271, 272, 11 Moore, 139.

into or recognized in the United States, and the same statement is repeated in *Youngs v. Ransom*¹ The American editor² of Warren's Law Studies, in a note in the appendix, says: "The author is in error in stating that the law known as the ecclesiastical law in England is not recognized in the United States. * * * It would have been correct to say, that there was no *spiritual* law administered in any of the established courts of the United States, although that is also recognized by the private tribunals appointed by the religious societies to try offences against their own laws."

[There is a treatise on "American Ecclesiastical Law," by Ransom H. Tyler, and a Commentary on the General Canon Law and the Constitution of the Protestant Episcopal Church of the United States, by J. Vinton; also a treatise on Ecclesiastical Law in the State of New York, by Murray Hoffman.]

¹ 31 Barb. 49.

² Hon. Thos. W. Clerke, ex-justice of the Supreme Court, N. Y.

CHAPTER XI.

OF THE LAW OF NATIONS.

THE law of nations is a body of law, established among civilized independent states, for, under some circumstances, their common observance.¹ For the purpose, in some cases, of administering justice between individuals of those different states, the law of nations is a part of the law of England.² The same law is also a part of the law of this country [and of the United States] for, in some cases, the purpose of redress, when an individual of such a foreign state, as an ambassador, or other public minister, or his servant, is aggrieved by a violation here of the law of nations.³

[The law of nations is usually divided by writers upon the subject into two kinds, namely, the public law of nations, and the private law of nations.² The latter is now more frequently spoken of under the term "Conflict of Laws." Although, properly, there is some distinction between the conflict of laws and the private law of nations. The law of nations is based upon the fundamental principle, recognized

¹ 1 Bl. Com. 43; 4 Bl. Com., Book IV, ch. v.

² *Ricord v. Bettenham*, 1 W. Bl. 563; *Cornu v. Blackburne*, Dougl. 619, ed. 1783; *Wolff v. Oxholm*, 6 Maule and S. 92.

³ *Barbuit's case*, Cas. T. Talb. 281; *Buvot v. Barbut*, S. C., cited 3 Burr.

1480, and 4 Burr. 2016; In the matter of Count Haslang, 1 Dick. 274; *Triquet v. Bath*, 3 Burr. 1478, 1 W. Bl. 471; *Heathfield v. Chilton*, 4 Burr. 2015; *Hopkins v. De Robeck*, 3 Durn. and E. 79; *Viveash v. Becker*, 3 Maule and S. 284.

equally by ancient and modern jurists, that a state is to be regarded as a moral person—that the moral obligations of individuals and nations are identical. “Justice (as Mr. Mill has said) is as binding on communities as it is on individuals, and men are not warranted in doing to other countries, for the supposed benefit of their own country what they would not be justified in doing to other men for their own benefit.” The law of nations in modern times has received a development unknown to the ancients, owing to the superior civilization, and constantly increasing national intercourse.]

Sources, from which it is the habit of the courts of this country [and of the United States] to seek for knowledge of the law of nations, are, the practice of foreign countries;¹ and “such writers of all nations and languages as are generally approved and allowed of;”² as, Barbeyrac,³ Beawes,⁴ Bynkershoek,⁵ Grotius,⁶ Molloy,⁷ Puffendorff,⁸ Vattel,⁹ Wicquefort.¹⁰ [To these authorities may be added Burlinque on Natural and Political Law; Gardner’s Institutes of International Law; Halleck’s Elements of International Law; and the same author on International Law; Levy’s International Commercial Code; Phillimore on International Law; Polson’s Law of Nations; Twiss’ Law of Nations; Westlake’s Private In-

¹ Ricord v. Bettenham, above.—3 Burr. 1481.

² 4 Bl. Com. 67; 3 Burr. 1481; 3 Maule and S. 292.

³ 3 Burr. 1481; 4 Burr. 2016; Cas. T. Talb. 283; 3 Maule and S. 296.

⁴ 3 Maule and S. 297; 12 Moore, 337.

⁵ 3 Burr. 1481; 4 Burr. 2016; 2 Kenyon, 331; 6 Maule and S. 102.

⁶ Dougl. 626, ed. 1783; 3 Burr. 1481; 4 Burr. 2016; 3 Maule and S. 292; 6 Maule and S. 103—106.

⁷ 3 Maule and S. 298; 12 Moore, 38.

⁸ 6 Maule and S. 103—166.

⁹ 3 Maule and S. 292—297.

¹⁰ Cas. T. Talb. 283; 3 Burr. 1481; 4 Burr. 2016; 3 Maule and S. 296; 1 Taunt. 108.

ternational Law; Savigny's Private International Law; Beamis on Neutrality; Cockburn on Nationality; De Burg on Maritime International Law; Lawrence on Visitation and Search; Woolsey's Study of International Law; Kent's Commentaries on International Law; and an edition of the same by J. T. Abdy; Mackintosh on the Study of the Law of Nature and Nations; Wheaton on International Law, with Dana's notes; Lewis on Foreign Jurisdiction and Extradition; Clarke on Extradition; Bernard on the Growth of Laws and Usages of War.]

CHAPTER XII.

OF CERTAIN TEXT AND OTHER BOOKS.

SOME works written on English law are authority, namely, are sources which supply proof of the law, and accordingly may, in the courts of Westminster Hall, be cited for proof of the law.¹ And these, or the like, sources of such proof appear to derive their quality of authority, from some property in them that attracts homage and obedience.²

¹ Litt. §. 481; Co. Litt. 11 a, 280; 2 Lord Raym. 919; Willes, 346; 1 W. Bl. 140; 2 W. Bl. 1266; 5 Barn. and Ald. 282; 2 Bing. 297; 5 Bing. 166, 167, 168; 8 Bing. 515, 534; 1 Eden, 199; 3 Madd. 20; 1 Bl. Com. 72.

² In *The King v. Almon*, a case of libel upon the Court of King's Bench, Mr. Justice Wilmot thus speaks of the *authority* of a court, when he notices a difference between its *authority* and its *power*: "It seems," he says, "to be material to fix the ideas of the words 'authority' and 'contempt of the court,' to speak with precision upon the question. By the word 'court' I mean the judges who constitute it, and who are intrusted by the Constitution with a portion of jurisdiction defined and marked out by the common law, or acts of parliament. 'Contempt of the court' involves two ideas; contempt of their power, and contempt of their authority. The word 'authority' is frequently used to express both the right of declaring the law, which is properly

called jurisdiction, and of enforcing obedience to it, in which sense it is equivalent to the word power: but, by the word 'authority,' I do not mean that coercive power of the judges, but the deference and respect, which is paid to them and their acts from an opinion of their justice and integrity. Livy uses it according to my idea of the word, in his character of Evander:—'*Auctoritate magis quam Imperio pollebat*:'* it is not *Imperium*; it is not the coercive power of the court; but it is homage and obedience rendered to the court, from the opinion of the qualities of the judges who compose it; it is a confidence in their wisdom and integrity, that the power they have is applied to the purpose for which it was deposited in their hands; that authority acts as the great auxiliary of their power." And afterwards the same learned judge says:—"The Constitution has provided very apt and proper remedies

* "*Evander tum ea auctoritate magis, quam imperio, regebat loca.*" Liv. i. 7.

["The treatises of the sages of the profession whose works have an established reputation for correctness may be referred to as guides."¹ And in some points text books appear to be the sole guide; for, as was said by Lord Stowell—"With regard to decided cases, I must observe generally that very few are to be found in any administration of the law, in any country, upon acknowledged and settled rules. Such rules are not controverted by litigation; they are, therefore, not evidenced by direct decisions; *they are found in the maxims and rules of books of text law.* It would be difficult, for instance, to find an English case in which it was directly decided that the heir takes the real and the executor the personal estate; yet, though nothing can be more certain, it is only incidentally and *obiter* that such a matter can force itself upon any recorded observation of a court; equally difficult would it be to find any litigated case on the canon law establishing the doctrine, that a contract *per verba de præsenti* is a present marriage, though none is more deeply radicated in that law." A statement of the author's view of the law contained in Roper on Husband and Wife, which Lord Campbell designates "an obscure book," is supposed to have affected, if not controlled, the decision in *The Queen*

for correcting and rectifying the involuntary mistakes of judges, and for punishing and removing them for any voluntary perversions of justice. But if their authority is to be trampled upon by pamphleteers and newswriters, and the people are to be told that the power, given to the judges for their protection, is prostituted to their destruction, the court may retain its

power some little time, but I am sure it will instantly lose all its authority: and the power of the court will not long survive the authority of it." Wilmot's Notes, pp. 256, 257, 259.

¹ Shaw Ch. J., *Com'wealth v. Chapman*, 13 Met. 68, 70; Chase C. J., *The State v. Buchanan*, 5 Har. and J. 317, 365; *Com'wealth v. Churchill*, 2 Met. 118.

against Millis,¹ as to which, see what is said by Lord Campbell in his *Life of Lord Lyndhurst*.²]

Several works, that are authority, have been written by persons, who have been judges of a court of Westminster Hall—an elevated rank that clearly increases the authority of their writings.³ Works bearing this augmented authority, are—

Glanville *de Legibus*,⁴ “an ancient book, and of very great authority.”⁵ [Glanville remained in manuscript for more than three centuries, and was finally printed by the “persuasion and procurement of Sir William Staunford.” Coke cites him frequently in his reports, and Reeves has incorporated most of Glanville in his *History of the Common Law*.]

Bracton *de Legibus*.⁶ “He was Chief Justice of England in the reign of Henry III. . . . Surely such a man is no mean authority for what the common law was at the time he wrote:”⁷ “Bracton wrote on the law of England, and the situation which he filled, namely, that of Chief Justice in the reign of Henry III, gives great authority to his writings:”⁸ “As to the authority of Bracton, to be sure many things are now altered; but there is no color to say, it was not law at that time, for there are many things that have never been altered, and are law now:”⁹ “His writings interweave a great many things out of the Roman law.”¹⁰

¹ 10 Cl. and Fin. 534.

² Page 141.

³ 5 Bing. 167; 3 Dow, 15.

⁴ Willes, 346; 2 H. Bl. 154, 155.

⁵ By Willes, C. J., Willes, 346.

⁶ 2 Lord Raym. 914, 915, 916, 919; 2 W. Bl. 1266; 5 East, 290; 5 Barn. and Ald. 281, 282; 1 Brod. and B. 579; 1 Dow and Cl. 187.

⁷ By Best, J., 5 Barn. and Ald. 282.

⁸ By Best, C. J., 5 Bing. 167, 2 Bligh New Rep. 160.

⁹ By Parker, C. J., Fortesc. 408, cited 5 Barn. and Ald. 282, and 5 Bing. 168.

¹⁰ By Wilmot, J., 3 Burr. 1670. And see 3 Durn. and E. 263, and 5 Barn. and Ald. 281, 282; also Barrington on the Statutes, 5th ed. p. 89 n.

[“That an English writer of the time of Henry III,” says Maine,¹ “should have been able to put off on his countrymen as a *compendium* of pure English law, a treatise of which the entire form, and a third of the contents were directly borrowed from the *Corpus Juris*, and that he should have ventured on this experiment in a country where the systematic study of the Roman law was formally proscribed, will always be among the most hopeless enigmas in the history of jurisprudence.”]

Littleton's Tenures.² “The sayings of Mr. Littleton are adjudged for law, and are judgments.”³ He is classed among “persons of the greatest authority,”⁴ and is distinguished by the title of “our great master.”⁵ [Roger North says that he knew a Lord Keeper, who read Littleton “every Christmas as long as he lived;” and Lord Coke says, “And for Littleton's tenures I affirm, and will maintain against all opposition whatsoever, that it is a work of as absolute perfection in its kind, and as free from error, as any book that I have known to be written of any human learning.”]

Fortescue *de Laudibus Legum Angliæ*.⁶ [Fortescue, says Marvin in his Legal Bibliography, was a favorite author among the old lawyers, and will be read with profit in modern times by those who are interested in the origin and progress of the common law.]

Fitzherbert's *Natura Brevium*;⁷ a book “of very

¹ Ancient Law, 79 N. Y. ed.

² 2 Sim. 347, 348.

³ By Hobart, C. J., Godb. 297.

⁴ By Willes, C. J., Willes, 332; 2
Younge and J. 618

⁵ By Graham, B., 1 McClel. and
Y. 193.

⁶ Willes, 543; 1 West's Cas. T.
Hardw. 27.

⁷ Of Sir M. Hale's Commentary,
for Notes thereon, see 9 Mod. 307.

high authority;”¹ an authority “which is certainly entitled to great respect.”² [The work is still regarded as authority. In *Wilkins v. Earle*,³ Chief Justice Robertson says, “The whole doctrine is summarily stated in the recital of the original writ in Fitzherbert’s *Natura Brevium*, and such writ forms the ground-work of the early decision in *Cayles’ case*.”]

Coke’s Commentary upon Littleton.⁴ Eyre, C. J., speaks of the “learning and industry of that great man, Sir Edward Coke, whose name ought never to be mentioned in a court of law without the highest respect.”⁵ And Best, C. J., referring to an opinion contained in the Copyholder, of the same great lawyer, mentions it as an opinion “entitled to great respect, considering the person by whom it was pronounced;”⁶ and on the same occasion, giving judgment in the Court of Common Pleas, he adds,—“If this opinion of Lord Coke is warranted by law, it appears to me to be a decisive authority in favor of the judgment we shall pronounce. . . . The fact is, Lord Coke had no authority for what he states; but I am afraid we should get rid of a good deal of what is considered law in Westminster Hall, if, what Lord Coke says without authority, is not law. He was one of the most eminent lawyers that ever presided as a judge in any court of justice; and what is said by such a person is good evidence of what the law is, particularly when it is in conformity with justice and common sense.”⁷ This favorable representation, however, is not the only

¹ By Eyre, C. J., 1 Bos. and P. 122. And see 2 Mod. 193.

² By Lord Tenderden, 7 Barn. and Cr. 196.

³ 3 Robertson, 365.

⁴ 2 Mod. 193; 3 East, 558; 2 Maule

and S. 227, 278; M’Clel. 668; 1 M’Clel. and Y. 199; 12 Moore, 312, 315; 17 Ves. 531.

⁵ 1 Bos. and P. 123.

⁶ 2 Bing. 295.

⁷ 2 Bing. 296, 297.

picture judicially drawn of the great commentator;—the reverse of it is yet to be seen. Willes, C. J., while opposing an opinion in Coke Littleton, says of the author,—“He was so very great a man, that unfortunately all his *dicta* (though some of them when they come to be thoroughly examined by those who are *nullius addicti jurare in verba magistri*, will be found not to be right) have passed for law ever since;”¹ “he was certainly a great man, which has made some people think everything he says is right, though he has his mistakes.”² Buller, J., remarks,—“With respect to what is said relative to the admiralty jurisdiction in 4 Inst. 135, I think that that part of Lord Coke’s work has always been received with great caution, and frequently contradicted. He seems to have entertained not only a jealousy of, but an enmity against, that jurisdiction.”³ In the same case, in which Chief Justice Eyre inculcated the duty to mention with high respect the name of Coke, Heath, J., adverting to certain *dicta*, asks,—“After all, what reliance can there be had on these *dicta* of Lord Coke, under all the circumstances attending them? They were not the result of a calm, dispassionate inquiry: that great lawyer was much heated in the controversy between the courts at Westminster and the ecclesiastical courts. In every part of his conduct, his passions influenced his judgment. *Vir acer et vehemens*. His law was continually warped by the different situations in which he found himself.”⁴

[The value of Coke’s Commentary to a modern lawyer, is thus stated by Chancellor Kent—“Many of the doctrines which his writings explain and illus-

¹ Willes, 341.

³ 3 Durn. and E. 348.

² 3 Atk. 141.

⁴ Bos. and P. 131.

trate, have become obsolete, or have been swept away by the current of events. The influence of two centuries must inevitably work a great revolution in the laws and usages, as well as in the manners and taste of a nation. Perhaps everything useful in the Institutes of Coke may be found more methodically arranged and more interestingly taught, in the modern compilations and digests; yet his authority on all subjects connected with the ancient law, is too great and too venerable to be neglected. The Commentary ought to be studied and mastered by every lawyer who means to be well acquainted with the reasons and grounds of the law, and to adorn the noble science he professes." Mr. Hoffman, also, says: "And let not the American student of law suppose that the same necessity does not here exist, as in England, to make this 'golden book' his principal guide in the real law. All precedent in this country contradicts such an idea. The present generation of distinguished lawyers, as well as that which has just passed away, have given ample proofs of their familiarity with the writings of Lord Coke; and our numerous volumes of reports daily illustrate, that with trivial exceptions, what is the law of real property at Westminster Hall, is equally so in the various tribunals throughout our extensive country."]

Bacon's Elements of the Common Laws of England;¹ "a little book, but that little book the work of a very great man."²

Hale's History of the Pleas of the Crown:³ His

¹ 1 West's Cas. T. Hardw. 158, 159;

1 Atk. 461, 462.

³ 1 Stra. 701; Willes, 50; 1 Brod.

and B. 570, 574. See Wilmot's Notes, 99, 100.

² By Lord Hardwicke, 1 West's Cas. T. Hardw. 158.

Treatises *De Jure Maris*;¹ *De Portibus Maris*.² [Hale's History of the Pleas of the Crown was, Burnet informs us, commenced in the reign of Charles I. After the king was beheaded, the author hid his manuscript behind the wainscoting of his study. In 1680 the House of Commons passed an order to have the manuscript printed, but for some reason the order was not carried into effect, and the work remained in manuscript until printed under the editorship of Emlyn. Dallas, C. J., referring to this work, is reported to have said:³ "With respect to Lord Hale, it is needless to remind those whom I am now addressing, of the great character for learning and legal knowledge of that person of whom it was said, that what was not known by him was not known by any other person, who preceded or followed him, and that what he knew he knew better than any other person who preceded or followed him."]

Foster's Discourses upon the Crown Law.⁴

Blackstone's Commentaries;⁵ an opinion in which valuable work, Grose, J., quotes as "deserving of great attention."⁶ It is important, however, to state, that in a case, where, in the Court of Chancery, in Ireland, the same work was cited by counsel, Lord Redesdale made the observation,—“I am always sorry to hear Mr. Justice Blackstone's Commentaries cited as an authority: he would have been sorry himself to hear the book so cited: he did not consider it such.”⁷

¹ 4 Barn. and Cr. 505. This Treatise is printed in "A Collection of Tracts," edited by Mr. Hargrave.

² 15 East, 304; 5 Barn. and Ald. 285. This Treatise is also in the same Collection of Tracts.

³ 1 Brod. and Bing. 570.

⁴ Cowp. 7; 3 East, 582, 583.

⁵ 10 Bing. 147, 151, 487; 3 Price, 391; 8 Price, 62, 63; Dan. 292; 2 Crompt. and J. 308.

⁶ 4 Durn. and E. 311. The opinion there referred to is in 1 Bl. Com. 373.

⁷ 1 Sch. and Lef. 327.

[Blackstone is not authority¹ upon Constitutional law,² *contra*.³ His knowledge of English history was rather superficial.⁴ He was a feeble reasoner and confused thinker.⁵ His opinions upon criminal law are to be regarded as the offspring of an eager, rather than a well-informed mind.⁶ His Commentaries "contain a thousand sophistries dangerous to the principles which every citizen of our free republic ought, and every professor of our laws, is sworn, to maintain." ⁷]

Doddridge's Treatise of the Nobility of the Realm; "a great authority" on the subject of grants of peerage;⁸ "a high authority on these matters."⁹

With the above authorities may also be ranged the work of a Lord Chancellor of Ireland—Mitford's (Lord Redesdale's) Treatise on the Pleadings in Chancery.¹⁰ [Characterized as "a wonderful effort."¹¹]

Besides the books mentioned, the following works appear also to bear the impress of authority:—

The Register;¹² which is "a most ancient book of the common law; and it is two-fold, viz., *registrum brevium originalium*, and *registrum brevium judicialium*. It is a French word, and signifieth a memorial of writs. Sometimes the register of original writs is called *registrum cancellariæ*; because all original writs do issue out of the chancery, as *extra*

¹ 1 Sch. and Lef. 327; Peck's Trial, 303; Ritso's Law Education, 33.

² Fox, 6 Cobbett's Parl. Debates, 314.

³ Story's Inaugural Address, 59; 4 Durn. and E. 311.

⁴ Hallam's Middle Ages, ch. viii.

⁵ Mackintosh's Ethical Philos. 187.

⁶ L'd Eldon, 1 Jurist, 459 n.

⁷ Sampson on Codes and Com. Law, 6.

⁸ By Lord Brougham, 2 Dow and Cl. 204.

⁹ By Lord Wynford, 2 Dow and Cl. 207.

¹⁰ 2 Younge and J. 41; 1 Sim. 369-371; and see 1 M'Clel. and Y. 319, 320.

¹¹ 9 Ves. 54.

¹² Litt. §. 9, 101, 234; Plowd. 228 a; 1 Stra. 158; 2 Maule and S. 436, 437.

officinam justitiæ:"¹ "There is a register of original writs, and a register of judicial writs; but when it is spoken generally of the register, it is meant of the register original."² The register is "of great authority in law;"³ is a book "of very high authority,"⁴ "of the greatest authority."⁵

Doctrina Placitandi;⁶ "a book which has always been admitted to be of great authority in pleading, and was often quoted by Lord Chief Justice Willes."⁷

Briton.⁸

Doctor and Student,⁹ [is one of the most esteemed of the ancient law books, and has been an authority for about three centuries, having been constantly cited from the time of Chief Justice Brooke to the present period.¹⁰]

Ancient Readings:¹¹ "By the authority of Littleton, ancient readings may be cited for proof of the law; but new readings have not that honor, for that they are so obscure and dark."¹²

Perkins' Profitable Book;¹³ "which is a very good authority in point of law."¹⁴

Sheppard's Touchstone of Common Assurances;¹⁵ on quoting which, Willes, Chief Justice, observed,— "I rely much upon Sheppard's Touchstone, which is a

¹ Co. Litt. 159 a. And see *ibid*, 16 b, and 78 b.

² Co. Litt. 16 b.

³ Co. Litt. 73 b.

⁴ By Eyre, C. J., 1 Bos. and P. 122.

⁵ By Willes, C. J., Willes, 48.

⁶ 1 Crompt. and J., 314.

⁷ By Lawrence, J., 2 East, 340.

⁸ 3 Bos. and P. 382; 6 Bing. 140.

⁹ 2 Mod. 193; 2 Lord Raym. 915; 8 Price, 63-66; 8 Bing. 491.

¹⁰ Marvin's Legal Bibliography.

¹¹ Litt. §. 481. "I object to Brooke's

Readings as authority. They were no more than lectures." By Burrough, J., 3 Brod. and B. 226; 6 Moore, 553, 564.

¹² 1 Co. Litt. 280 b. And see *ibid*, 11 b.

¹³ 2 P. W. 714. See 1 W. Bl. 477, 478.

¹⁴ By Lord Mansfield, Cowp. 203.

¹⁵ Willes, 684; 4 Durn. and E. 312; 11 East, 663; 2 Barn. and Cr. 206, 207; McClel. 668.

most excellent book.”¹ Buller, J., mentions it as a work of Mr. Justice Dodderidge.² And eminent counsel have, on citing it, spoken of it as a book, which, “though fathered by Sheppard, who published it as his own, is understood to be of higher lineage, and has been with some probability attributed to Judge Dodderidge, and well deserves to be considered as no mean authority.”³ And on another occasion, when Mr. Preston cited Sheppard’s *Touchstone*, naming it “an excellent work,” Sir John Leach upheld this character of it by subjoining,—“You say right: there is as much sound information in that work, as in any known to the profession.”⁴

West’s *Symbolography*;⁵ “which has always been esteemed a book of authority.”⁶

Hawkins’ *Treatise of the Pleas of the Crown*.⁷ Dallas, Chief Justice, referring to this book, and to Sir M. Hale’s *History of the Pleas of the Crown*, on the subject of jurisdiction of justices of the peace, observes,—“If the authority of Lord Hale, and that of Mr. Sergeant Hawkins, are to be treated lightly, we may be without any authority whatever. With respect to Lord Hale, it is needless to remind those, whom I am now addressing, of the general character for learning and legal knowledge of that person, of whom it was said, that what was not known by him was not known by any other person, who preceded or followed him; and that, what he knew, he knew better than any other person, who preceded or followed him. With respect to Mr. Sergeant Hawkins, we know his author-

¹ 2 Wils. 78; Willes, 684.

² 4 Durn. and E. 639.

³ 2 Bos. and P. New Rep. 13.

⁴ 4 Madd. 46.

⁵ 2 Barn. and Adol. 638.

⁶ By Sir J. Mansfield, 2 Taunt. 85.

⁷ 1 Barn. and Ald. 244; 1 Barn. and Cr. 274; 1 Brod. and B. 570, 573, 574, 576, 597.

ity. These are books which are in the hand and head of every lawyer, and constantly referred to on every occasion of this sort."¹ [Hawkins' Treatise was formerly much esteemed, but later publications upon crown law have somewhat impaired its value as a practical work.²]

Callis' Reading upon the Statute of Sewers: "one of the best performances on that subject, and which has always been admitted as good authority;"³ a testimony that is corroborated by Best, J., who says,— "I have often heard Lord Kenyon speak with great respect of that writer."⁴

Gibson's *Codex Juris Ecclesiastici Anglicani*;⁵ the authority of which writer on the subject of advowsons "has always been considered as entitled to great respect:"⁶ "It has been often said of the author of this book, that he was a good common lawyer."⁷

Mr. Justice Park, quoting Burn's Ecclesiastical Law, mentions the author, Dr. Burn, as one "who is now no more, and may be now considered perhaps as an authority, as much as Bishop Gibson, and was a very considerable man."⁸ [Blackstone, in his Commentaries, mentions this book as one of the very few books on ecclesiastical law on which the reader can rely. Burn was also author of a law dictionary, a posthumous publication, and of the work known as Burn's Justice. The latter work was abridged and adapted to the law of Massachusetts when a colony.]

Lord Hardwicke, relying on Clarke's *Praxis Curix*

¹ 1 Brod. and B. 570.

² Marvin's Legal Bibliography.

³ By Buller, J., 2 Durn. and E. 365. 36.

⁴ 5 Barn. and Ald. 282.

⁵ 3 Brod. and B. 36; 3 Bing. 254, 546.

⁶ By Park, J., 8 Bing. 539.

⁷ By Burrough, J., 3 Brod. and B.

⁸ 3 Bing. 259. And see 8 Bing

255; 8 Bing. 539, 540,

Admiralitat Angliæ, speaks of the writer, as “an author of undoubted credit,” and of the work, as “a book of very good authority.”¹

With regard to abridgments and digests, some bear the three characters of,—1. An original volume of reports; 2. A depository of cases elsewhere reported; and 3. An original publication of opinion or doctrine. As original publications of opinion or doctrine, (the only character which the present chapter properly embraces,) some abridgments and digests undoubtedly are authority; namely, in the sense that they are sources of proof of the law, and accordingly may be cited for proof of the law.

Works of this description are,—

Brooke’s Abridgment.² Sir T. Clarke, relying on this learned writer’s opinion, which is a conclusion that he introduces by the words *ideo videtur*,³ observes,—“Though this is introduced by an *ideo videtur*, in a modest manner, yet many of his opinions are so introduced, and have generally been thought of very great authority.”⁴

Comyns’ Digest; “a book of very excellent authority.”⁵ And Lord Kenyon, relying on an opinion there, and for which no authority was cited, has said,—“Though no authority is referred to in support of it, yet the opinion alone of so able a lawyer is of great authority.”⁶ And, speaking of another opinion of Comyns in the same work, Lord Kenyon on a different occasion says,—“He has not, indeed, cited any authority for this opinion, but his opinion alone is of great authority; since he was considered by his cotempora-

¹ 1 Atk. 296; 1 West’s Cas. T. Hardw. 27.

² See 3 Bing. 395.

³ Bro. Abr. tit. Feof. al Uses, pl. 34.

⁴ 1 W. Bl. 140; 1 Eden, 199.

⁵ 1 Maule and S. 363. And see 1 Barn. and Ald. 713, and 8 Price, 61.

⁶ 3 Durn. and E. 631.

ries as the most able lawyer in Westminster Hall.”¹ And, to the same effect, Best, Chief Justice, citing Comyns’ opinion in his Digest, observes,—“This he lays down on his own authority, without referring to any case; and I am warranted in saying, we cannot have a better authority than that learned writer.”²

Many works there are, which, perhaps, are not impressed with the character, that is designated by the term authority,³ but which nevertheless are, with much respect, regarded by the bench.

Books of this kind are:—

Dalton’s Country Justice;⁴ a book “published in the reign of James I, and which, though not a judicial authority, is of considerable weight.”⁵

Degge’s Parson’s Counsellor; a text book, which Richards, Chief Baron, referred to, as he had “always understood it to be a book of some value as an authority.”⁶

Lilly’s Practical Register: “It might,” says Lord Redesdale, “be too much to quote this book as an authority in matter of law; but, in a matter of practice, I think it is a sort of authority.”⁷

Marius’ Advice concerning Bills of Exchange;⁸ a book, which, upon questions on those bills, “has always been treated with considerable respect, though not the production of a lawyer: it was written in early times by a person conversant with the custom of merchants respecting bills of exchange: the rules laid down by him have been since received by the mercan-

¹ 3 Durn. and E. 64.

² 5 Bing. 387, 388.

³ 1 Brod. and B. 595; 4 Bing. 614; 8 Barn. and Cr. 518; 3 Dow, 15; 2 Atk. 22; 1 Sch. and Lef. 79.

⁴ 3 Bos. and P. 254; 1 Brod. and B. 579.

⁵ By Richardson, J., 1 Brod. and B. 595.

⁶ 8 Price, 60; Dan. 291.

⁷ 1 Sch. and Lef. 79.

⁸ 6 East, 8, 11.

tile world; and his book has been frequently referred to by courts of justice, and by the most able authors treating upon commercial subjects.”¹

Nolan’s Treatise of the Laws for the Relief and Settlement of the Poor;² “a text book, from which the profession derive great assistance.”³

The Office of Executors; “which is a book of good authority.”⁴

Phillipps’ Treatise on the Law of Evidence;⁵ which book Best, C. J., citing on a point of evidence, says—“which I refer to, not as authority, but as proof of the understanding of Westminster Hall on the subject.”⁶

The Practical Register in Chancery;⁷ it “is not a book of authority, but it is better collected than most of the kind.”⁸ “it is a good book, and seldom mentions any thing without authority.”⁹

Preston’s Treatise on Conveyancing; a passage in which work Bayley, J., quoting, says—“I do not cite this book as an authority, though from the learning, research, experience, and discrimination of the author, it is extra-judicially entitled to great weight.”¹⁰

Sugden’s Treatise of Powers; “a very intelligent and useful publication;¹¹ “a book of great authority, and to which the professional public are much indebted.”¹²

Les Termes de la Ley; “which is a very excellent book.”¹³

¹ By Lord Kenyon, 6 Durn. and E. 212.

² 4 Barn. and Cr. 959.

³ By Bayley, J., 6 Barn. and Cr. 736.

⁴ By Lord Hardwicke, 9 Mod. 477.

⁵ 1 Barn. and Ald. 21.

⁶ 4 Bing. 614.

⁷ 2 Sim. and St. 243; 2 Sim. 86.

⁸ By Lord Hardwicke, 2 Atk. 22.

⁹ By Lord Thurlow, 2 Bro. C. C. 146.

¹⁰ 8 Barn. and Cr. 518.

¹¹ By Lord Manners, 2 Ball and B. 30.

¹² By Park, J., 2 Brod. and B. 535.

¹³ By Lord Kenyon, 1 East, 459.

Tidd's Practice ;¹ " a book of practice of very great authority."²

Williams' Notes to Saunders' Reports ;³ which notes Tindal, C. J., cites as a work, that " is now esteemed a text book of our law ;"⁴ and Vaughan, B., relying on a statement in them, says—" This is the view taken by the late Mr. Serjeant Williams, than whom a sounder lawyer, or more accurate special pleader, has rarely done honor to his profession."⁵ And still stronger praise of the same learned writer was expressed by Lord Eldon in the House of Lords, when his lordship observed—" Though one who had held no judicial situation, could not regularly be mentioned as an authority, yet he might say, that, to any one in a judicial situation, it would be sufficiently flattering to have it said of him, that he was as good a common lawyer as Mr. Serjeant Williams ; for no man ever lived, to whom the character of a great common lawyer more properly applied."⁶ [The present state of the common law may now probably be best learned from " the notes of Patteson and Williams on Serjeant Williams' notes on Saunders' reports."⁷ These reports have been described as " The bible of the law of special pleading."]

Other law-works, which have experienced the honor of being quoted, or with approbation in some way noticed, by the bench—an honor, which, at the same time that it marks the merit of those works, also shows the habit of the courts to seek for, imbibe, and sanction, the information and instruction to be derived

¹ 8 Barn. and Cr. 3 ; 2 Crompt. and J. 316.

² By Vaughan, B., 2 Younge and J. 562.

³ 3 Bos. and P. 178 ; 2 Younge and J. 426.

⁴ 9 Bing. 637.

⁵ 1 Crompt. and J. 9.

⁶ 3 Dow, 15.

⁷ Campbell's Lives of Chanc. ch. ix, note.

from those sources, are—Amos and Ferard's Treatise on the Law of Fixtures;¹ Beawes' *Lex Mercatoria*;² Deacon's Law and Practice of Bankruptcy;³ Duke's Law of Charitable Uses;⁴ Fearne's Essay on Contingent Remainders and Executory Devises;⁵ Godolphins' *Repertorium Canonicum*;⁶ His Orphan's Legacy;⁷ Jacob's Law Grammar;⁸ Malynes' *Lex Mercatoria*;⁹ Pigott's Treatise of Common Recoveries;¹⁰ Preston's Essay on Abstracts of Title;¹¹ Starkie's Treatise of the Law of Evidence;¹² Swinburne's Treatise of Testaments;¹³ Watkins' Essay on the Law of Descents."¹⁴ [It would be tedious to attempt the enumeration of all the works which have been quoted, or noticed by the bench, we, therefore, do not add to the list of works mentioned by the author.

[It seems to be understood on the bench, and at the bar of England, that a law-writer is not authority during his lifetime.¹⁵ No such idea prevails in the United States.

[The attaching more importance to a book from the fact of its author being a judge, either at the time of producing the book, or by subsequent elevation, admits of these defences: first, from the author being

¹ 1 Barn. and Adol. 395.

² 16 East, 397, 398; 3 Maule and S. 297; 12 Moore, 337.

³ 7 Barn. and Cr. 706.

⁴ 3 Ves. 69.

⁵ 3 Bos. and P. 656; 10 Barn. and Cr. 190, 200; 10 Bing. 148, 149, 151.

⁶ 8 Bing. 491.

⁷ 1 West's Cas. T. Hardw. 117, 118; 1 Atk. 501.

⁸ 7 Taunt. 498, 499.

⁹ 16 East, 396, 398; 2 Barn. and Ald. 80.

¹⁰ 2 Bos. and P. New Rep. 504.

¹¹ 10 Barn. and Cr. 200.

¹² 1 Crompt. and J. 10; 4 Bing. 614.

¹³ 2 H. Bl. 219; 1 West's Cas. T. Hardw. 117, 118, 119, 360, 472, 473; 1 Atk. 501.

¹⁴ 2 H. Bl. 401; 3 Bos. and P. 657.

¹⁵ Reg. v. Ion, 2 Den. C. C. 475; 6 Cox's C. C. 1; 16 Jur. 746; 14 Eng. Law and Eq. R. 556; 1 Ben. and H. Lead. Cas. 400; Reg. v. Drury, 3 Cox's C. C. 544; 1st Rep. Eng. Com. Law Com'rs, and 3 Bing. 259.

promoted to a judgeship, it may be presumed he was a man of learning and talent ; and secondly, the causes which render the *dictum* of a judge, as such, greater authority, than the *dictum* of any other man, are the same as those which render the *dictum* of a judge in a law treatise more authoritative than would be the *dictum* of any other. The whole theory of judicial precedent rests in the superstition lying at the very foundation of legal ideas. The earliest notion of law was not the enunciation of a principle, but an authoritative sentence, rendered after the act passed upon, and assumed to be a direct divine inspiration. The judgment or sentence was from God, the judge was but the minister to announce it. The statement of Lord Coke, that "Almighty God openeth and enlargeth the understanding of the (judge) desirous of justice and right"¹ was a consequence of the idea that God directly dispensed justice. The judge being inspired, his *dicta* were to be revered and respected. Hence judicial precedent.]

A practical remark, which Lord Alvanley has made on text writers, is,—“When we find an opinion in a text writer upon any particular point, we must consider it not merely as the private opinion of the author, but as the supposed result of the authorities to which he refers.”²

It is difficult, in some cases, to draw the line of partition between books that are, and books that are not, authority. Between one writer who has, and another writer who has not, held a judicial situation, the boundary is strongly marked ; but when one, who has not been a judge, as Perkins, Hawkins, and Callis, is regarded as authority, the line of separation between

¹ 9 Co. Preface.

² 3 Bos. and P. 301.

him and other writers, to whom the dignity of authority is refused, as Williams and Preston, is not easily distinguishable. It may be perceived, nevertheless, that a writer, who, like Burn, is "now no more," and whose doctrine, like the rules of Marius, has been received by the profession, and whose book, like Marius' book, has been frequently referred to by courts of justice, and by the most able authors treating upon the same subjects,—may, through these circumstances, gain the rank of authority; but, then, what is it that now excludes Marius himself, and Dalton, and Williams, from the same dignified position? These difficulties have been met in the only way in which it has been judged proper to approach them here,—namely, by taking the observations which the Bench has made on different authors, as the guide to range them.

[Story, writing in 1831, says:¹ "Hitherto the jurisprudence of America has attracted very little notice in England, and seems, indeed, to have been passed by with utter neglect. * * * Not an English decision or treatise is published three months, before it finds its way to our libraries, and is there studied and criticised with profound attention. It is not too much to say that every just effort is made here to administer the common law, especially the commercial law, with vigor, with sound judgment, and with elaborate learning. * * * It has struck the profession in America, as somewhat remarkable, that in commercial questions of acknowledged novelty and difficulty, English lawyers should diligently consult the jurisprudence of some of the petty states of continental Europe, without ever deeming that of their own

¹ 2 Life and Letters of Story, 71.

descendants in America worth examination." "The writings of Story are cited as authority in Westminster Hall, and Lord Campbell, in alluding to them in a debate in the House of Lords, spoke of their author as 'greater than any law writer of which England could boast, since the days of Blackstone.'" ¹ Again Story says: "English law books are but too often mere digests of cases, arranged with more or less system, but wanting in all the elements of a philosophic or scientific treatise. They are generally mere compendiums written for practical lawyers, and for *nisi prius* use, serving rather as text books of precedents than of principles." ² "It must be admitted," says Lord Campbell, ³ "that juridicial writing is a department of literature in which the English have been very defective, and in which they are greatly excelled by the French, the Germans, and even by the Scotch."

[Text writers have sometimes corrected the errors of the courts: thus Chitty, in his treatise on contracts, limited the decisions in *Dyer v. Pearson*, ⁴ and *Boyson v. Coles*, ⁵ and his limitation was adopted and approved in *Higgins v. Burton*. ⁶ On the other hand, the errors of text writers have sometimes misled the courts: thus the rule laid down in Phillips on Evidence, that a memorandum made by a witness cannot be used as evidence, unless the witness, after referring to the memorandum, has a present recollection of the facts to which the memorandum relates, was long adhered to in the highest court of the State of New

¹ Speech, on motion of thanks to Lord Ashburton, 7th April, 1847.

² 2 Story's Life and Letters, 568.

³ 1 Camp. Chauc. ch. ix, note.

⁴ 3 B. and C. 38.

⁵ 6 M. and S. 14.

⁶ 26 Law Jour. 352, Ex.

York; but now a different rule prevails,¹ because it appears that the rule as laid down by Phillips originated in a misapprehension of the cases of *Doe v. Perkins* and *Tanner v. Taylor*.]

Many of the books, that have been mentioned, having been written by persons at the bar, the present may be considered an appropriate place wherein to impart such information as has been gathered, relative to the weight which the courts attach to the opinions and arguments of counsel. Buller, J., mentioning a case where "much was said of opinions given by eminent men at the bar," adds, "Such opinions, however well considered, have no weight in the scale of justice."² This proposition, as a general one, is probably correct.³ And, perhaps, generally speaking, counsel's arguments in another cause does not attract greater respect.⁴ It appears, however, that sometimes a counsel's opinion,⁵ or argument,⁶ given or delivered on a different occasion, may with propriety be cited at the bar; and instances occur, where such an opinion,⁷ or argument,⁸ has been, with respect, noticed on the bench, and such an argument the bench has even relied on.⁹

On the *Lex Mercatoria*, the law or usage of commerce, and generally on the law of nations, the courts consult, with great respect, the doctrines and opinions

¹ See *Halsey v. Sinsebaugh*, 15 N. Y. 487; *Guy v. Mead*, 22 N. Y. 405; *Marcy v. Shultz*, 29 N. Y. 351.

² Dougl. 328, ed. 1783, and 341, 4th ed.

³ 2 Bro. C. C. 77; 1 Madd. 617.

⁴ 2 Lord Raym. 914; 1 Stra. 38; 2 Bing. 299; Wightw. 36-50. On counsel's arguments, reported by Coke and

Croke, see 8 Price, 59, and Dan. 291; also 1 Lord Raym. 631.

⁵ 4 Madd. 504; 4 Sim. 362, 363.

⁶ 6 Durn. and E. 485.

⁷ 4 Sim. 363, 364.

⁸ 1 Lord Raym. 631; 1 H. Bl. 53.

⁹ 6 Durn. and E. 485, 486; 8 Durn. and E. 518, 519; 1 M'Clel. and Y. 192, 193.

contained in works of many foreign writers;¹ as Barbeyrac,² Bynkershoek,³ Emerigon,⁴ Grotius,⁵ Pothier,⁶ Puffendorff,⁷ Vattel,⁸ Wicquefort.⁹

On the subject, besides, of domicile, "there is so little to be found in our own law," that the courts "are obliged to resort to the writings of foreign jurists, for the decision of most of the questions that arise concerning it."¹⁰ Such foreign jurists are, Bynkershoek, Denisart, Pothier, and Voet.¹¹

And for a variety of purposes,¹² as, to authorize or strengthen an opinion,¹³ or to gain information on the meaning of a word,¹⁴ or on the policy of a system of laws,¹⁵ different books, that are not confined to law subjects, are occasionally referred to and quoted on the bench; as, for example, Burnet's Discourse of the Pastoral Care;¹⁶ Locke's Treatise of Government;¹⁷ Smith's Wealth of Nations;¹⁸ Spelman's Glossary;¹⁹ Du

¹ See also chap. viii. and xi. of the present Treatise.

² 3 Burr. 1481; 4 Burr. 2016; Cas. T. Talb. 283; 3 Maule and S. 296.

³ 3 Burr. 1481; 4 Burr. 2016; 2 Kenyon, 331; 6 Maule and S. 102.

⁴ 5 Maule and S. 465; 2 Barn. and Ald. 81, 82; 3 Barn. and Ald. 402, 403, 406; 2 Crompt. and J. 251.

⁵ Dougl. 626, ed. 1783; 3 Burr. 1481; 4 Burr. 2016; 3 Maule and S. 292; 6 Maule and S. 103-106.

⁶ 16 East, 395-398; 3 Barn. and Ald. 402, 406; 5 Barn. and Ald. 480, 481; 2 Bos. and P. New Rep. 300.

⁷ 6 Maule and S. 103-106.

⁸ 3 Maule and S. 292-297; 6 Maule and S. 100, 102, 105, 106.

⁹ Cas. T. Talb. 283; 3 Burr. 1481; 4 Burr. 2016; 3 Maule and S. 296; 1 Taunt. 108.

¹⁰ 3 Meriv. 79. And see 5 Ves. 786.

Late cases connected with the subject of Domicile are: *In re Ewin*, or *Ewing*, 1 Crompt. and J. 151, 1 Tyrwh. 91; and *in re Bruce*, 2 Crompt. and J. 436, 2 Tyrwh. 475.

¹¹ 5 Ves. 763, 786, 789; 3 Meriv. 79.

¹² The court's admission of books and other sources of information, for the purpose of evidence, is a matter distinct from the present subject, and will be found fully discussed in the modern treatises on the Law of Evidence.

¹³ 2 W. Bl. 1054; 5 Bing. 165, 166.

¹⁴ 1 Anstr. 44; 1 Brod. and B. 441.

¹⁵ 1 East, 157.

¹⁶ 2 W. Bl. 1054.

¹⁷ 5 Bing. 165, 166; 1 Dow and Cl. 186; 2 Bligh's New Rep. 159.

¹⁸ 1 East, 157.

¹⁹ 1 Wils. 114; 2 Bos. and P. New Rep. 507; 2 Crompt. and J. 305.

Cange's Glossary;¹ Minshew's Guide into Tongues;² Johnson's Dictionary;³ Falconer's Marine Dictionary;⁴ a dictionary of a foreign, as the Italian, language.⁵

[Although a general dictionary of the English language is not authority, to show on a trial the meaning of a word which is relied on, as deriving a peculiar meaning from mercantile usage,⁶ yet dictionaries are frequently referred to by the bench and bar. A dictionary was referred to in *Sprigg v. Rawlinson*.⁷ Webster's Dictionary was cited as authority in *Reg. v. Ion*;⁸ and in another case,⁹ Chief Justice Earl, referring to that dictionary, said: "Webster is very impartial." "I abstain," said Johnson, J.,¹⁰ "from quoting dictionaries." In *Burke v. Allison*,¹¹ Justice Byles observed, he "was much struck with the definition of tenant in Webster's Dictionary." A number of dictionaries, as well of English as of other languages, are cited in the very learned opinion of Daly, first judge, in *Cromwell v. Stephens*.¹² Even the poets are sometimes referred to; thus Wordsworth is quoted, in *Duke of Marlborough v. Osborn*;¹³ Byron is quoted, in *Kimball v. Ladd*;¹⁴ Prior is quoted, in *Reid v. Hood*,¹⁵ and Shakespeare is quoted in more cases than we could conveniently enumerate, but we will mention Taylor

¹ 2 Crompt. and J. 305.

² 1 H. Bl. 56.

³ 2 Bos. and P. New Rep. 285; 1 Brod. and B. 441; 1 Crompt. and J. 130.

⁴ 1 Brod. and B. 441.

⁵ Cowp. 154.

⁶ *Houghton v. Gilbert*, 7 Car. and P 701.

⁷ Cro. Car. 554.

⁸ 2 Den. C. C. 475; 16 Jur. 746;

¹⁴ Eng. Law and Eq. R. 559.

⁹ *Earl of Lisburne v. Davies*, 1 Law Rep. 264, C. P.

¹⁰ *The People v. Cowles*, 13 N. Y. 357.

¹¹ 3 Jurist, N. S. 694.

¹² 3 Abb. Pr. R. 26 N. S.; 2 Daly, 15.

¹³ 5 Best and Smith, 67.

¹⁴ 42 Vermont, 756.

¹⁵ 2 Nott and McCord, 172.

v. Bullen,¹ *Duke of Marlborough v. Osborn*,² and *Riddle v. Weldon*.³ At the bar of the State courts of the United States, counsel feel at liberty to cite from any source which may throw light on the subject under discussion: thus, in New York, Charles O'Connor frequently cites the British Reviews; as, for instance, he did in the Lemon slave case.⁴ The writer once cited a decision of Judge Nelson, from a newspaper report, and the court not only listened to it, but referred to it in the opinion, and stated a concurrence with "the views ascribed to Mr. Justice Nelson."⁵]

NOTE.—No dictionary has been so extensively quoted as Webster's. The following is a list of some of the words, the definitions of which in Webster's Dictionary have been adopted and approved by the courts:

- | | |
|---|---|
| Cargo— <i>Kreuger v. Blanck</i> , 5 Law Rep. 183, Ex. | Prostitute—8 Iowa, 554. |
| Forthwith— <i>Van Wyck v. Hardy</i> , 39 How. Pra. R. 399. | Prostitution—6 Iowa, 447; 8 Barb 603. |
| Beer— <i>Nevin v. Ladue</i> , 3 Denio, 43; <i>The People v. Whelock</i> , 3 Park. Crim. R. 9. | Benefit— <i>Fitch v. Bates</i> , 11 Barb. 471. |
| House— <i>Thompson v. The People</i> , 3 Park. Crim. R. 208. | File— <i>Bishop v. Cook</i> , 13 Barb. 326. |
| Willfully,— <i>Injury—Northern R'y Co. v. Carpentier</i> , 3 Abb. Pr. R. 259; 13 How. Pr. R. 222. | Interest— <i>Fitch v. Bates</i> , 11 Barb. 471. |
| Thoroughfare— <i>Wiggins v. Tallmadge</i> , 11 Barb. 457. | Jobber— <i>Steward v. Winters</i> , 4 Sandf. Ch. 587. |
| Assign— <i>Bump v. Van Arsdale</i> , 11 Barb. 634. | Lend— <i>Elton v. Markham</i> , 20 Barb. 344. |
| Judiciously—9 Iowa, 236. | Lottery— <i>N. Y. Almshouse v. Am. Art Union</i> , 7 N. Y. 228; <i>People v. Payne</i> , 3 Denio, 88. |
| Skillfully— <i>Id.</i> | Meet— <i>Woodburn v. Mosher</i> , 9 Barb. 255. |
| Resident— <i>Hinds v. Hinds</i> , 1 Iowa, 36. | Proceeds— <i>Dow v. Whetter</i> , 8 Wend. 160. |
| Believed—1 Iowa, 153. | Purchase— <i>Hoyt v. Van Alstyne</i> , 15 Barb. 568. |
| Expert—1 Iowa, 167. | Residence— <i>Bartlett v. N. Y.</i> , 5 Sand. 44; <i>Crawford v. Wilson</i> , 4 Barb. 504. |
| Homestead—1 Iowa, 435. | Team— <i>Harthouse v. Rikers</i> , 1 Duer, 606. |
| Surety— <i>Pitkins v. Boyd</i> , 4 G. Greene, 259. | Shave— <i>Stone v. Cooper</i> , 2 Denio, 293. |
| Completed— <i>State v. Bissell</i> , 4 G. Greene, 334. | Security— <i>Stone v. Waddell</i> , 2 Sandf. Ch. 494. |
| Being—4 G. Greene, 333. | Over—12 Iowa, 105. |
| Carelessness—3 Iowa, 92. | President—9 Iowa, 296. |
| Permit—4 Iowa, 543. | |
| Character—5 Iowa, 394; 8 Barb. 603. | |
| Chaste— <i>Dillons' (Iowa) Digest</i> , 378. | |

¹ 5 Exch. 786.

² 5 Best and Smith, 67

³ 5 Wharton, 15.

⁴ 20 N. Y. 571.

⁵ *Stevens v. Hauser*, 39 N. Y. 305.

CHAPTER XIII.

OF REPORTS.

CERTAIN collections of printed and published cases adjudged by, or that in some way have come before, the courts of Westminster Hall or the House of Lords, are called reports.¹ A reported case is authority;² and of so much value, that Sir E. Coke deduces from Littleton, that "our book-cases are the best proofs what the law is."³ To each adjudged case belongs a record,⁴ which Sir E. Coke says, "is regularly a monument or act judicial, before a judge or judges, in a court of record, entered in a parchment in the right roll. It is called a record, for that it recordeth, or beareth witness of, the truth."⁵ And elsewhere the same great lawyer states of a record, that it is "a memorial or remembrance in rolls of parchment of the proceedings and acts of a court of justice, which hath power to hold plea according to the course of the common law. . . . Legally, records are restrained to the rolls of such only as are courts of record, and not the rolls of inferior nor of any other courts, which proceed not *secundum legem et consuetudinem Angliæ*."⁶ The record of a case, which has not been reported, is of

¹ Litt. § 514; Co. Litt. 293 a; 3 Co. Pref.; 4 Inst. 4; 1 Bl. Com. 71.

² Litt. § 420, 514; Co. Litt. 11 a, 24 a, 254 a, 293 a, 293 b.

³ Co. Litt. 254 a.

⁴ 1 Inst. 117 b, 260 a; 3 Inst. 71; 4 Inst. 4; 3 Co. Pref. 3, 4; 1 Bl. Com. 69; Spelman's Gloss. ver. Recordum.

⁵ 3 Inst. 71.

⁶ Co. Litt. 260 a.

great authority, and is sometimes vouched for proof of the law.¹ A record of an adjudged case is a register of "the judgment itself, and all the proceedings previous thereto;"² but, generally speaking, it is not a register of the reasons or causes of the judgment:³ in the record, "the reasons or causes of the judgment are," observes Sir E. Coke, "not expressed; for wise and learned men do, before they judge, labor to reach to the depths of all the reasons of the case in question, but in their judgments express not any; and in troth, if judges should set down the reasons and causes of their judgments within every record, that immense labor should withdraw them from the necessary services of the commonwealth, and their records should grow to be like *Elephantini libri*, of infinite length, and, in my opinion, lose somewhat of their present authority and reverence."⁴ It appears, however, not to be universally true, that a record does not contain the reasons of a judgment, since sometimes a decree of the Court of Chancery does contain the ground of the decree.⁵ And Sir E. Coke himself testifies, that, anciently, in some judgments, the reasons of them were set down in the record. This he does in a passage, which may here claim to be noticed, on account of his observations there made on those records and the records of parliament, and their comparative authority. "The reason," he says, "wherefore the records of parliament have been so highly extolled, is, for that therein is set down in cases of difficulty, not

¹ Litt. § 20, 514; Co. Litt. 24 a, 293 b; 2 Wils. 92; 2 Younge and J., 365, 367. See also 7 Durn. and E. 740, 743. So an unreported case is sometimes cited from the register-book of the Court of Chancery. 1 West's Cas. T. Hardw. 362, 374.

² 1 Bl. Com. 69.

³ 3 Co. Pref. 3; 4 Inst. 4.

⁴ 3 Co. Pref. 3.

⁵ Lane v. Williams, 2 Vern. 277, 292, ed. Raithby; cited 1 Meriv. 564.

only the judgment, or resolution, but the reasons and causes of the same by so great advice. It is true, that of ancient time in judgments at the common law, in cases of difficulties, either criminal or civil, the reasons and causes of the judgment were set down in the record, and so it continued in the reigns of Edward I, and most part of Edward II; and then there was no need of reports: but in the reign of Edward III, (when the law was in its height,) the causes and reasons of judgments, in respect of the multitude of them, are not set down in the record; but then the great casuists and reporters of cases (certain grave and sad men) published the cases, and the reasons and causes of the judgments or resolutions, which, from the beginning of the reign of Edward III, and since, we have in print. But these, also, though of great credit, and excellent use in their kind, [are] yet far underneath the authority of the parliament rolls, reporting the acts, judgments, and resolutions of that highest court.”¹

A record, so far as it extends, is the best test of the correctness of a report of a case;² and, to try such correctness, a court or judge, therefore, often refers to it.³ And, contrariwise, as generally speaking the record of an adjudged case does not contain the reasons the court gave for its judgment, it is, in ordinary instances, necessary to search for them in some other source; and one source for this purpose is, a report of the case; reports being, according to Sir

¹ 4 Inst. 3.

² 2 Lord Raym. 1203; 2 Maule and S. 567; 3 Ves. 656; 4 Inst. 17.

³ 2 Lord Raym. 982, 1121; 6 Mod. 76; Willes, 181, 569; 1 Stra. 209; 2

Maule and S. 518; 9 Barn. and Cr. 282; 1 Crompt. and M. 267; 3 Swanst. 466; Ambl. 459; 4 Dow, 201; 1 Bl. Com. 71.

W. Blackstone's general description, "histories of the several cases, with a short summary of the proceedings, which are preserved at large in the record; the arguments on both sides, and the reasons the court gave for its judgment, taken down in short notes by persons present at the determination." "And these," he adds, "serve as indexes to, and also to explain, the records; which always, in matters of consequence and nicety, the judges direct to be searched."¹ A further mean to correct a report of a case is, a manuscript note of it,² or the judge's own note of it.³

Sir E. Coke mentions the fact, that "the kings of this realm, that is to say, Edward III, Henry IV, Henry V, Henry VI, Edward IV, Richard III, and Henry VII, did select and appoint four discreet and learned professors of law to report the judgments and opinions of the reverend judges;" and by this consideration, among others, it may, he observes, evidently appear "how profitable and necessary the reports of the judgments and cases in law published in former ages have been."⁴ And, according to Sir W. Blackstone, "The reports are extant in a regular series from the reign of Edward II, inclusive; and, from his time to that of Henry VIII, were taken by the prothonotaries, or chief scribes of the court, at the expense of the crown, and published annually, whence they are known under the name of the year-books."⁵ And the same learned writer, in continuation, says: "It is much to be wished that this beneficial custom had, under proper regulation, been continued to this day;

¹ 1 Bl. Com. 71.

³ 3 Co. Pref.

² Willes, 166; 5 Durn. and E. 107; 3 Bos. and P. 652; 2 Ves. Jun. 238, 431.

⁴ 4 Ves. 24.

⁵ 1 Bl. Com. 71. On the year-books, see Hale's Hist. of Com. L., ch. iv, vii, and viii; also 6 Barn. and Cr. 7.

for though King James I, at the instance of Lord Bacon, appointed two reporters, with a handsome stipend, for this purpose, yet that wise institution was soon neglected; and, from the reign of Henry VIII, to the present time, this task has been executed by many private and contemporary hands, who, sometimes through haste and inaccuracy, sometimes through mistake and want of skill, have published very crude and imperfect (perhaps contradictory) accounts of one and the same determination.”¹ These observations of Blackstone are authorized by numerous instances of cases which the bench has mentioned to be reported inaccurately,² or differently, by different reporters.³ It sometimes complains that it cannot collect from the report, “upon what grounds the court went,”⁴ or “what the exact point before the court was,”⁵ or “what points were determined.”⁶ It has considered a particular case, cited from a report, as “too vague to be acted upon by the court.”⁷

Under the system of reporting by “private and contemporary hands,”⁸ it is not to be expected that the reports of different reporters will be of equal credit and authority, and experience proves that this equality does not exist.⁹ It proves, besides, that in

¹ 1 Bl. Com. 72.

² Lord Raym. 522; 12 Mod. 294; Willes, 181, 182, 245, 569; 1 Burr. 458, 459; 5 Durn. and E. 107; 7 Durn. and E. 239; 1 West's Cas. T. Hardw. 524; Ambl. 55, 56; 2 Ves. Jun. 120, 234, 238, 431; 3 Ves. 677, 678; 4 Ves. 24, 689; 5 Ves. 85, 661; 6 Ves. 640; 8 Ves. 250; 3 Russ. 71; 4 Russ. 340; 5 Russ. 96; 2 Russ. and M. 115; 3 Anstr. 824, 941; 13 Price, 168; M'Clel. 52, 59; 1 Crompt. and M. 307, 308; 5 Madd. 358; 1 Seb. and Lef. 35, 65, 71, 259, 268, 296, 378.

³ 1 Lord Raym. 416; Willes, 181, 182, 569; 4 Barn. and Adol. 117; 3 Atk. 804; Ambl. 459; 3 Russ. 301 n.; 1 Crompt. and M. 307, 308; 1 Sch. and Lef. 259.

⁴ Ambl. 55; 1 Crompt. and M. 266; 1 Bos. and P. 605.

⁵ M'Clel. 52.

⁶ 3 Bro. C. C. 398.

⁷ 1 Mont. and Mac. 281.

⁸ 1 Bl. Com. 72.

⁹ 1 Stra. 71; 5 Burr. 2731; 3 Durn. and E. 17.

the same reports, all the cases there are not equally well reported.¹ Between several reporters of a case, one of whom was counsel in the cause, it is naturally, perhaps, sometimes found that he, who was that counsel, has best reported it.²

Because "book cases are the best proofs what the law is,"³ and "the judgments of the courts of Westminster Hall are the only authority that we have for by far the greatest part of the law of England,"⁴ the goodness of reports is necessarily a matter of much importance; and, viewing cases as amongst the materials of which the courts construct their judgments, a subject of needful consideration is, the degree of estimation which judicial opinion has affixed to different reports. Some such opinions that have been gathered in this matter may, therefore, with propriety be here introduced.

Reporters to whom the opinions mentioned relate are:

Barnardiston.—When relying on a case in his King's Bench Reports, Lord Kenyon says of them, it is "not a book of much authority in general." In this instance, as his lordship noticed, this report agreed with Strange's report of the same case.⁵ On one occasion, Lord Mansfield absolutely forbade counsel's citing Barnardiston's Reports of Cases in Chancery. He said it was marvelous to those who knew the reporter, and his manner of taking notes, that he should so often stumble upon what was right; but yet, that there was not one case in his book which was so throughout.⁶ Sir R. P. Arden, citing a case in

¹ Willes, 181, 182; 1 Sim. 432.

⁴ 3 Bing. 588.

² 1 W. Bl. 101; 1 Burr. 428; Ambl.

⁵ 8 Durn. and E. 48.

193.

⁶ 2 Burr. 1142, marg.

³ Co. Litt. 254 a.

the same reports, admits that "the reputation of the book is not very high;" and, for this reason, his honor looked into the registrar's book, where, he adds, the case is very nearly as reported.¹ Lord Manners, relying on a case in these reports, observed: "Although Barnardiston is not considered a very correct reporter, yet some of his cases are very accurately reported."² And Lord Eldon, speaking of the same reports, and remarking on Lord Mansfield's opinion of them, has said: "In that book, however, there are some reports of great value."³ "I take the liberty of saying that in that book there are reports of very great authority."⁴

Brown.—On counsel mentioning a case in Brown's Chancery Reports, Sir L. Shadwell observed, it is "one of the cases in Brown, upon which no reliance can be placed with regard to the statement."⁵

Bunbury.—Lord Mansfield, in trying a cause, saved a particular point upon certain cases cited out of Bunbury. When the cause came before the court in bank, and counsel mentioned a case in those reports, Lord Mansfield said: "Mr. Bunbury never meant that those cases should have been published; they are very loose notes."⁶ Sir T. Plumer, in postponing his final decision in a cause to look into a case cited from Bunbury, observes of these reports, it is a book "certainly of no great authority."⁷

Burrow.—When Burrow reports a case, in which the court returned a certificate to the Court of Chan-

¹ 4 Bro. C. C. 36.

² 2 Ball and B. 386.

³ 1 Dow and Cl. 11.

⁴ 1 Bligh's New Rep. 538.

⁵ 4 Sim. 173. The value of Brown's Reports, it may be noticed, is greatly

augmented by the corrections and additions made thereto by Mr. Belt and Mr. Eden, in their editions of that work.

⁶ 5 Burr. 2658, 2659.

⁷ 2 Madd. 140.

cery, but did not publicly give the reasons of their opinion, full reliance may be placed on his statement of that opinion, and on the grounds of it, as supposed by him. For, speaking of such a case, Buller, J., says, that Burrow "certainly had the highest assistance in stating what he calls the probable grounds of the judgment;"¹ and that assistance is explained by the same learned judge, when, on a former occasion, citing the same case, he said: "It has been openly acknowledged by Lord Mansfield, and I have had repeated opportunities of hearing it from him in private, that he has given to Sir J. Burrow his own note and opinion of a case, which he could not deliver publicly in court; for it was not at that time the practice of this court [K. B.] to give their opinions here in cases which came from the Court of Chancery."²

Carthew.—Chief Justice Willes having occasion to speak of a case, in reporting which he fancied Carthew was mistaken, made the observation: "I own that Carthew is, in general, a very good and very faithful reporter."³

Coke.—It is not to be disputed that Blackstone is justified in saying, that some of the most valuable of the ancient reports are those published by Lord Chief Justice Coke."⁴ Of the same reports, Lord Bacon affirms, that "though they may have errors, and some peremptory and extra-judicial resolutions, more than are warranted, yet they contain infinite good decisions and rulings over of cases."⁵ Several judicial opinions on Coke's report of individual cases show the propriety of receiving with some caution cases reported

¹ 1 Bos. and B. 586.

² 3 Durn. and E. 96.

³ Willes, 181, 182.

⁴ 1 Bl. Com. 72.

⁵ Proposal for amending the Laws of England.

even by him. He has been charged with inserting his own opinion in the report. Chief Justice Holt, speaking of Southcote's case,¹ and dissenting from an opinion there, says: "My Lord Coke has improved the case in his report of it."² Chief Justice Willes, citing Gage's case,³ which, he says, "is not rightly reported by Lord Coke," and is otherwise reported in Moore, whose report, on searching the record, has been found to be right, goes on to say, referring to the point in that case: "But I own, if this point were to come as a new question before me, I should be of the same opinion with Lord Coke, who often gives his own instead of the opinion of the court."⁴ And, to the same effect, Gould, J., noticing a particular doctrine in Mary's case,⁵ remarks: "I always thought the doctrine of Lord Coke in Mary's case a singular doctrine of his own, and not any part of the judgment of the court."⁶ On his manner of reporting, Coke himself observes that it "is summary, relating the effect of all that was said of the one side by itself, and so likewise of the other, beginning ever with the objections, and concluding with the resolution and judgment of the court," "which," he adds, "I hold to be the best order of relation."⁷ The twelfth part of Coke's Reports is of less estimation than the preceding eleven parts. Holroyd, J., naming a case there, and adverting to a point in it which, as it seemed to him, might be questionable, says: "The book in which that case is found is not so accurate as the rest of the reports of Lord

¹ 4 Co. 83 b.

² 2 Lord Raym. 913, 914.

³ 5 Co. 45 b.

⁴ Willes, 568, 569.

⁵ 9 Co. 111 b.

⁶ 2 W. Bl. 1234.

⁷ 10 Co. Pref. xi b, xii. And see, further, on Coke's, and also on Croke's manner of reporting the observations of Richards, C. B., 8 Price, 59; and Dan. 291.

Coke, not having been published by him in his lifetime, but from his notes afterwards.”¹ And Parke, J., expressing an opinion that a part of the same case cannot be law, observes: “The 12th Rep. is not a book of any great authority;” and he mentions, besides the above opinion of Mr. Justice Holroyd, an opinion of Mr. Hargrave, that the 12th Rep. is “of small authority,” and of Mr. Serjeant Hill, that it is “not fit to be allowed.”² It appears, however, that this part of Coke’s reports is not always so lightly esteemed,³ with regard, at least, to some cases in it; as Graham, B., has relied on a case there as authority;⁴ and, on another occasion, Alexander, C. B., delivering the judgment of the court, waved the easy citation of other cases to support their opinion, and observed: “I shall merely refer to the high authority of Lord Coke on the point, in the Earl of Derby’s case, 12th Rep. 114.”⁵

[It was made part of the sentence, on suspending Coke as chief justice, that, in this enforced leisure, “he should enter into a view and retractation of such novelties and errors and offensive conceits as were dispersed in his reports.” Afterwards, on being brought before the Privy Council to give an account of what he had done in the way of correcting his reports, he declared that in his eleven volumes, containing five hundred cases, there were only four errors. Of these reports his enemy, Bacon, said: “To give every man his due, had it not been for Sir Edward Coke’s reports, which, though they may have errors,”⁶

¹ 4 Barn. and Ald. 614.

⁴ M’Clel. 331, 332.

² 10 Barn. and Cr. 275.

⁵ 1 M’Clel. and Y. 319.

³ See the opinion prefixed to it, dated 1655, and signed Edw. Bulstrode.

⁶ 3 Campbell’s Lives of the Chan. —Life of Lord Bacon.

and some peremptory and extra-judicial resolutions more than are warranted, yet they contain infinite good decisions and rulings over cases—the law by this time had been almost like a ship without ballast.”]

Dickens.—Of him, Lord Redesdale says,—“Mr. Dickens was a very attentive and diligent register; but his notes, being rather loose, were not considered as of very high authority; he was constantly applied to, to know if he had anything on such and such subjects in his notes; but, if he had, the register’s books were always referred to.”¹

Fitzgibbons.—Lord Hardwicke, referring to *Arthur v. Bockenham*, in Fitzgibbons, continues his observation by saying,—which book “I do not care to rely on, as it is of no authority, though this and some other cases are well reported in it; this particularly, very finely, for I have a manuscript note of it.”² And Chief Baron Parker, mentioning that case, and also *Bunter v. Coke* [*Bunker v. Cooke*,] in the same reports, adds,—“The cases in this book are very incorrectly reported; but I have been credibly informed that these two arguments are authentic.”³

Hobart.—Lord Kenyon calls Hobart’s Reports, “his excellent volume of reports.”⁴

Keble.—Chief Justice Willes mentions Keble as a reporter, who “seldom enlightens anything.”⁵ Lord Mansfield and Lord Kenyon style him, “a bad reporter.”⁶ Counsel having relied on a case in 3 Keble, Ashhurst, J., observed,—“This book does not stand in the highest degree of authority in general;

¹ 1 Sch. and Lef. 240.

⁵ Willes, 245.

² 1 Kenyon, 71; 7 Durn. and E. 418 n. See 3 Atk. 806.

⁶ Dougl. 292, ed. 1783, and 304, 4th ed.; 3 Durn. and E. 17. And see

³ 1 West’s Cas. T. Hardw. 509.

5 Burr. 2731; 3 Wils. 330, and 6 Bing. 664.

⁴ 6 Durn. and E. 441.

and I do not think the intrinsic merit of the report itself of this case will add much to its authority.”¹ And, on the same occasion, Lord Kenyon said,—“As to the case cited from 3 Keble, my brother Ashhurst has already observed, that that reporter is not always accurate; and if any instance were wanting to warrant the observation, the case referred to would prove it; because he there referred to another case of his own reporting, as of the preceding term, which is not there to be found.”²

Levinz.—Of him, Lord Mansfield says,—“Levinz is a much better reporter than Keble.”³ And where a cited case was reported by both, Lord Kenyon observed,—“The case cited from Levinz is entitled to greater consideration than that in Keble, who was a bad reporter.”⁴ The same superiority Lord Mansfield seems to have assigned to Levinz, with reference to another case reported by him and also by Keble.⁵

Mosely.—In a cause in the King’s Bench, counsel relied on a case that he cited from these reports, “which book Lord Mansfield told him he should not have quoted.”⁶ In another cause, counsel having cited a case from the same reports, Thompson, B., observed,—“As to the case in Mosely, the authority of that book is very small.”⁷ Another, and more favorable, opinion of these reports, remains, however, to be shown,—an opinion that will probably be con-

¹ 4 Durn. and E. 646.

² 4 Durn. and E. 649.

³ 5 Burr. 2731.

⁴ 3 Durn. and E. 17.

⁵ 5 Burr. 2731.

⁶ 5 Burr. 2629. It is possible that Lord Mansfield had not then much knowledge of that book: an acquaint-

ance with it was not at that time universal, since, in the same cause, counsel (Mr. Mansfield) in reply, observed,—“As to the case cited from a book, called Mosely’s Reports, he owned he had never seen such a book.” *Ibid.*

⁷ 3 Anstr. 861.

sidered to give preponderance to an advantageous judgment of them. Lord Eldon having mentioned a case there, takes occasion to state,—“In speaking of the book, in which this case of *W. v. S.* is to be found, I wish to make one other observation. That book has been brought into some disrepute by a saying of Lord Mansfield’s, that no man should cite Mosely. I myself think very differently from Lord Mansfield on that subject, having always considered Mosely’s Reports as a book possessing a very considerable degree of accuracy.”¹ And, according to another report of the case, in which this passage is found, Lord Eldon observed, that “although Lord Mansfield has said, that Mosely ought not to be cited, there are cases of great consequence in those reports.”²

Noy.—His reports being mentioned by Buller, J., this learned judge adds,—“But that book has always been considered as a bad authority.”³ A reason for this is assigned by Twisden, J., when, “for the case in Noy’s Reports, 23,” he said, “he wholly rejected that authority; for it was but an abridgment of cases by Serjeant Size, who, when he was a student, borrowed Noy’s Reports, and abridged them for his own use.”⁴ Another account of the same opinion is,—“Noy, 23, I wholly reject, as only an abridgment of cases per Serjeant Size, when a student.”⁵

¹ 1 Meriv. 92.

² 19 Ves. 488 n. (b).

³ 3 Durn. and E. 424. And see Cunningham on Sim. 77, 166.

⁴ 1 Vent. 81.

⁵ 2 Keb. 652. A note from Lord Hale’s MSS. being added to Coke’s, 1 Inst., and in which note is cited a case in Noy’s Reports, Mr. Hargrave observes thereon,—“As Lord Hale makes so frequent a reference to

Noy’s Reports, it may not be amiss to apprise the student that, though the book is known by the name of that very learned lawyer, yet there is not the least reason to suppose that such a loose collection of notes was intended by him for the public eye. In an edition of Noy’s Reports, *penes editorem*, there is the following observation upon them in manuscript: ‘*A simple collection of scraps of cases made*

Rolle.—Of a case reported by both Rolle and Palmer, Lord Parker, C. J., prefers the report by Rolle, observing,—“I have looked into the case of *S. v. M.* in *Palm.* 100, and 2 Rolle’s Rep. 166, 189, which Rolle never transcribed into his abridgment; he being at that time the experter reporter, has given the fullest account, and is chiefly to be regarded. For that case is 17 Jac. I, and Palmer was not attorney-general till King Charles the Second’s Restoration, (1 Sid. 465,) and must have been very young when that case was adjudged.”¹

Salkeld.—Lord Hardwicke, mentioning a case in 3 Salkeld, parenthetically says,—“(which by the by is a book of no authority, though the two first volumes are.”²)

Saunders.—Of him, Yates, J., says,—“Saunders was much the most accurate of the reporters of his time.”³ And Lord Eldon, in the year 1799, speaks of the same reports, as “that excellent book, the Reports of Saunders, made more excellent by a late edition.”⁴

Strange.—Referring to a case reported by him, Sir A. Hart states,—“Although Strange is not a book we can place much confidence in, yet, in this particular instance, it appears to be a very able and sound judgment, and well reported.”⁵

Williams.—Sir R. P. Arden, citing a case, says,—

by Serjeant Size, from Noy’s loose papers, and imposed upon the world for the reports of that vile prerogative fellow, Noy.’ This account of Noy’s Reports, which was probably written soon after the first publication, in 1656, though expressed in terms inexcusably gross, contains an anecdote

not altogether useless.” 1 Inst., ed. Hargrave, 54 a, n.

¹ 1 Stra. 71.

² Ambl. 12.

³ 3 Burr. 1730.

⁴ 2 Bos. and P. 23.

⁵ Sim. 432.

"It is most accurately reported, as most of the cases are, in Peere Williams."¹

Winch.—Of his reports, Lord Kenyon states,—
 "The cases in Winch are, in general, well reported; but in the preface to Benloe's and Dalison's Reports, it seems as if those were not really the reports of Sir H. Winch; for it is there said, 'the book called Winch's Reports, but improperly enough ascribed to that learned judge.' And, indeed, it appears that several of the cases in that book were decided after Sir H. Winch's death."²

Besides Reports, which bear the name of the Reporter, there are many volumes of reports, which consist of collections of cases published anonymously; and, in these instances, it is often unknown by whom the notes of the cases were taken.

Anonymous reports, some judicial remarks on which have been gathered, are:—

Cases in Chancery.³—Lord Manners, expressing his dissatisfaction with a case in the first volume, says,—
 "It comes from a book of very doubtful authority."⁴
 And on Lord Eldon mentioning in the House of Lords, the propriety that the registrar's book should be searched for a particular case in the second volume, Lord Redesdale concurred by saying,—
 "Yes; for the chancery cases are very incorrect."⁵

Modern Cases in Law and Equity.—Wilmot, J., citing a case in the first part or volume⁶ of these

¹ 4 Ves. 464.

² 6 Durn. and E. 441.

³ The two parts or volumes of these reports are commonly cited as 1 or 2 Ch. Cas. And it is proper to notice, that "Reports of Cases in Chancery" are a distinct collection of cases,

And the three volumes of them are usually cited as 1, 2, or 3 Ch. Rep.

⁴ 2 Ball and B. 183.

⁵ 6 Dow, 9.

⁶ This volume appears to be cited as 8 Modern; 7 Durn. and E. 239; 2 Burr. 1166.

Reports, observes,—“That case is reported in Modern Cases in Law and Equity; but it is totally mistaken there, as indeed are nine cases of ten in that book.”¹

Precedents in Chancery.—Lord Loughborough names these reports, “a book of considerable authority.” For mentioning a case there, which he found to be “totally mis-reported,” and adverting to a circumstance connected with it, he says,—“I thought it right to mention this, lest that case being found in a book of considerable authority might mislead again.”²

Select Cases in Chancery.—These Reports Lord Redesdale calls, “a book of no great authority.”³

In addition to the cases published in volumes distinctively named Reports, there are many which are published, and may therefore be said to be reported, in books of a separate character, or in a manner otherwise different. Books of such separate character, and which contain cases so reported, are chiefly works entitled, Abridgments of Cases.

Abridgments on which, as reports or otherwise, some judicial observations have been found, are:—

Brooke’s Abridgment.⁴—Heath, J., with reference to a remark that had been made by Rooke, J., says,—“I observe my brother Rooke seems to think, that what is laid down by Brooke is not of much authority; but I have always understood that the abridgers had access to the records themselves; and many cases, that appear in the Year Books with an *Adjournatur*,

¹ The King v. Ashton, 8 Mod. 175, cited in Rex v. Vipont, by Lord Kenyon, stated from a MS., 7 Durn. and E. 238, 239.

² 5 Ves. 664.

³ 2 Sch. and Lef. 634.

⁴ A work of Sir Robert Brooke, Chief Justice of the Court of Common Pleas.

are laid down by them as decided; which could be only by their having access to the records."¹

Rolle's Abridgment of many Cases and Resolutions of the Common Law.²—This work, Lord Kenyon mentions, was published under the inspection of Sir M. Hale.³ And Graham, B., calls it, "one of the best books of the kind we have."⁴ Twisden, an eminent judge in the reign of Charles II, with reference to an opinion of Rolle that had been cited, says,—“That was his opinion, it may be, when he was a student. You have in that work of his a commonplace, which you stand too much upon. I value him where he reports judgments and resolutions. But otherwise it is nothing but a collection of Year Books, and little things noted when he made his commonplace books.”⁵

A General Abridgment of Cases in Equity.⁶ The following observations have been made on two volumes of this Abridgment, considered as a work containing reports of cases. The first and second volumes do not, it will be seen, bear the same character. The first volume Sir R. P. Arden designates as “a very good book.”⁷ Buller, J., was satisfied of the accuracy of a report of a case there, “considering the authority of the book in which that case is contained.”⁸ Also

¹ 3 Ves. 656.

² A work of Mr. Sergeant Rolle, afterwards Chief Justice of the Court of King's Bench.

³ 4 Durn. and E. 64; 5 Durn. and E. 205.

⁴ 9 Price, 618.

⁵ 1 Mod. 273.

⁶ Two volumes published, “unrecommended by any authoritative approbation, or even a name in the title-page.” They are commonly cited as 1 or 2 Eq. Cas. Abr. Lord Redesdale,

citing a case in the first volume, and also reported in Precedents in Chancery, observed,—“It is supposed that Mr. Pooley, who was the collector of the cases in Precedents in Chancery, was also the compiler of the first part of Equity Cases Abridged; and certainly the cases are generally, as well as in this instance, verbatim in one book and in the other.” 1 Sch. and Lef. 269 n. See also 3 Ves. 285.

⁷ 4 Ves. 566.

⁸ 5 Durn. and E. 61.

Eyre, C. J., concluded it to be probable, that a case there reported was correctly stated.¹ Sir T. Plumer and Lord Manners concur in opinion, that the second volume is a book, "certainly, of no great authority."² Lord Eldon, speaking of a case reported by Barnardiston, observes in continuation,—“The case happens to be reported likewise in another book of no very high character,—I mean the second volume of the Equity Cases Abridged. It is not so high in character, as the first volume of the Equity Cases Abridged.”³ A testimony, favorable, however, to this report of the case his Lordship elsewhere offers in these words:—“The case is reported in the Equity Cases Abridged, and reported from a valuable manuscript, as I know, from having had the assistance of a genuine report from the library of Lord Redesdale.”⁴ Sir R. P. Arden, relying on a case in the second volume, and which, it would seem, he supposed to be reported, and not merely abridged,⁵ there, says,—“Though this book is not a book of the first authority, I must be guided by such cases as stand in point there; and particularly by a case which contains so much sense, as induces me to rely upon it, in conjunction with the other authorities.”⁶

Several cases inserted in Viner's Abridgment are taken from a source, which he names, “MS. Rep. said to be Lord Harcourt's,”⁷ or, merely, “MS. Tab.”⁸ On counsel citing a position laid down “in the marginal

¹ 1 Bos. and P. 614.

² 2 Madd. 140; 2 Ball and B. 28.

³ 1 Bligh's New Rep. 538, 539.

⁴ 1 Dow and Cl. 11.

⁵ The case is, *Palmer v. Schribb*, 2 Eq. Cas. Abr. 291, but not reported from MS., and on the contrary a mere

abridgment of the report in 8 Vin. Abr. 289, tit. Devise, pl. 25.

⁶ 2 Bro. C. C. 45, 46.

⁷ For example, 13 Vin. Abr. 544, tit. Fraud, A. a., pl. 12, 13.

⁸ For example, 14 Vin. Abr. 457, tit. Interest, C. pl. 4, marg.

table of cases in the House of Lords, made by Lord Harcourt," and observing, "that index is quoted frequently by Viner as authority," Lord Loughborough interposed and said—"The index to the cases in the House of Lords only refers to the cases. One decree by Lord Harcourt will be much better authority. There is no doubt that it is the work of Lord Harcourt's secretary, whom he employed to make that index."¹ Lord Redesdale, mentioning a case referred to in Viner's Abridgment, and there stated from a "MS. Rep. said to be Lord Harcourt's," observes on it—"It is said to be taken from Lord Harcourt's Tables, which are extremely accurate; but I have not been able to find the case."² The same index or table exists in manuscript;³ and it may be useful to remind the reader, that in the Table of Principal Matters in Brown's Reports of Cases in Parliament, ed. Tomlins, "are included the contents of a manuscript index prepared by or for Lord Chancellor Harcourt, and which is the MS. table so frequently quoted by Viner in his Abridgment."⁴

Many of the notes in Dyer's Reports contain accounts of cases, which may be considered as reported by those notes. The notes referred to are those added by Chief Justice Treby. Grose, J., refers to certain notes there, as the addition of that learned judge.⁵ And on counsel citing a case stated in one of the notes in Dyer, and enforcing his objections to that case by the remark, "besides that it is only a marginal note,"

¹ 2 Ves. Jun. 159.

² 1 Sch. and Lef. 380.

³ The author possesses an apparently early MS. copy of this collection of cases. It is entitled, "A Table to the most remarkable Points

in the Printed Cases upon Appeals to the House of Lords, since the year 1701 to the year 1728."

⁴ Vol. I, Advertisement; vol. VIII, p. 339.

⁵ 6 Durn. and E. 442.

Buller, J., interposed the observation—"The marginal notes in Dyer are good authority; they were written by Lord Chief Justice Treby."¹ And Gibbs, C. J., referring to certain marginal notes there, refers to them as notes, "which are always to be regarded with deference, coming from an authority so considerable as Chief Justice Treby."²

[The subject-matter of this chapter has been so admirably treated in Mr. Wallace's very interesting book, entitled "The Reporters," that we content ourselves by referring our readers to that work for further information on the subject.

[In England, the existence of numerous independent reporters, each proceeding according to his own views, was found so inconvenient as to call for a change, and now under the supervision of a Council of Law Reporting, the series of reports known as "The Law Reports," have superseded almost all the previously existing reports.

[As regards the reports of the United States, we must be pardoned if we say they are very voluminous, and for the most part very bad. Some of the series of New York reports have had, and have a good reputation; but the reports of the highest court of that State, at one time, became so bad as to call forth the following strong animadversion: "The recent reports of cases in the Court of Appeals, except that of Mr. Hand, are an outrage upon the court, the profession, and the world."³

[Keeping in view the number of States, and that in many of these States there are several series of reports, it will be obvious how utterly impossible it

¹ 2 Durn. and E. 84.

² 1 Albany Law Jour. 265.

³ 4 Dow, 202.

would be, within any reasonable space, or with any degree of precision, to attempt an exposition and analysis of the respective merits and defects of American reports and reporters. Such a topic would readily, if not necessarily, occupy a volume. One general feature seems to pervade the entire series of American reports. The judges write the opinions; and the reporter, it would seem, considers his duty fulfilled, if he sees to it that the opinions are reproduced in type, with more or less accuracy, bound up into a volume, with an index and a table of the cases alphabetically arranged. So far as our knowledge extends, we are not aware of the existence of any reporter who undertakes to *report* oral decisions, nor ventures upon the responsibility of *editing* the opinions delivered to him for publication. By *editing*, of course, we intend the abridging or rearranging, as the reporter may, in his judgment, seem necessary. On the subject of reports, in addition to Mr. Wallace's book, which we have already noticed, we would refer the reader to Kent's Commentaries, vol. I, section xxi, and to two articles in the American Jurist, volumes VIII and X; one article by Judge Metcalfe, and the other by Charles Sumner.

[Bouvier, in his Law Dictionary, title Reports, remarks: "The number of reports has increased to an inconvenient extent, and should they multiply in the same ratio which of late they have done, they will soon so crowd our libraries as to become a serious evil. The indiscriminate report of cases of every description is deserving of censure. Cases, where first principles are declared to be the law, are reported with as much care as those where the most abstruse questions are decided. But this is not all; sometimes two reporters, with the true spirit of book-making,

report the same set of cases, and thereby not only unnecessarily increase the lawyer's already encumbered library, but create confusion by the discrepancies which occasionally appear in the report of the same case. The modern reports are too often very diffuse and inaccurate. They seem too frequently made up for the purpose of profit and sale, much of the matter they contain being either useless, or a mere repetition, while they are deficient in stating what is really important."

[The following list exhibits the number of volumes of Reports, in each State, at the close of the year 1870: The increase in New York is at about the rate of ten volumes a year—

	Vols.		Vols.
Alabama	62	Nevada	5
Arkansas	25	New Hampshire	47
California	37	New Jersey	52
Connecticut	43	New York	348
Delaware	6	North Carolina	63
Florida	12	Ohio	43
Georgia	43	Oregon	2
Idaho	1	Pennsylvania	139
Illinois	50	Rhode Island	7
Indiana	40	South Carolina	83
Iowa	31	Tennessee	46
Kansas	5	Texas	32
Kentucky	68	Vermont	50
Louisiana	72	Virginia	63
Maine	56	Washington Territory	1
Maryland	72	West Virginia	3
Massachusetts	101	Wisconsin	29
Michigan	22	United States Supreme, Cir-	
Minnesota	14	cuit, etc., Courts	150
Mississippi	44		
Missouri	45	Total number	2012

CHAPTER XIV.

OF PRECEDENT; CONSISTING OF ONE OR MORE THAN ONE DECISION IN BANK, OR ON APPEAL.

SECT. I. Of Adherence to one Decision.

II. Of Adherence to two or more Decisions.

III. Of Departure from one Decision.

IV. Of Adherence to a Fixed Doctrine.

V. Of Discordant Decisions, or Series of Decisions.

SECTION I.

OF ADHERENCE TO ONE DECISION.

[“I AM aware,” said Senator Root, in *Henry v. Bank of Salina*,¹ “that the lawyers generally understand, and so I have, in some measure, treated the subject myself, that the decisions of our higher courts establish the law upon the matters decided, and that such decision becomes the law of the land to govern thereafter in all cases to which it applies. That notion of the power and efficacy of judicial decision most probably has its influence with the members of this court. I hope it will not, however, have such an influence as to induce them to treat legislative enactment as secondary and subordinate to judicial enactment, and under its control I hope we shall consider what a decision really is, and treat it accordingly, not, as the law nor as giving the law, but simply as evidence of the law; and not conclusive evidence, but only as *prima facie* evidence of what the law is. The most elaborate and mature decision of our highest

¹ 5 Hill, 535.

court is but *prima facie* evidence of the law, for the Legislature may declare it otherwise.”]

“The law of England, which is exclusive of positive law enacted by statute, depends upon principles.”¹ [And legal principles are as authoritative upon the courts, and control their decisions as absolutely as a legislative enactment.² For “if law be a science, and it really deserves so sublime a name, it must be founded on principle.”³] On these principles it is often the duty of a court to decide a case;⁴ as, for example, a case that is new, or one like to which a case decided is not to be found.⁵ A case decided is called a precedent;⁶ and is an authority, which, under many circumstances, binds a court to make the same decision in a future similar case.⁷ [If the rule of *stare decisis* is of any value, it should be adhered to. “When the precise question is again presented in the same court, between the same parties, and substantially on the same state of facts.”⁸ “A solemn decision upon a point of law, in any given case, is authority in a like case; . . . the highest evidence of the law applicable to the subject. If a decision has been made, upon solemn argument and mature deliberation, the presumption is in favor of its correctness.”⁹]

¹ Cowp. 39.

² Com'wealth v. Chapman, 13 Met. 68, 70; Martin v. Martin, 25 Ala. 201; Powell v. Brandon, 24 Miss. 343.

³ Jones on Bailments.

⁴ Cowp. 39; 2 Bos. and P. 24, 25, 374; 7 Durn. and E. 148; 2 Brod. and B. 505; 2 Bro. C. C. 340; 7 Ves. 195.

⁵ Cowp. 39; 7 Taunt. 515, 516; 1 Cox, 339, 340; 4 Ves. 808, 809.

⁶ Cowp. 39; 6 Durn. and E. 645; 4 Ves. 809.—

“Mastering the lawless science of our law,
That codeless myriad of precedent,

That wilderness of single instances,
Thro' which a few by wit or fortune led,
May beat a pathway out to wealth and fame.”
Tennyson's Aylmer's Field, p. 73.

⁷ Dougl. 326, 327, ed. 1783; 1 East, 541, 542; 6 East, 513; 1 Maule and S. 696, 697; 7 Barn. and Cr. 477; 3 Bing. 391; 2 Crompt. and M. 64; 3 Ves. 313; 2 Sim. 271; 3 Sim. 41.

⁸ N. Haven R. R. v. Ketchum, 34 How. Prac. Rep. 304.

⁹ 1 Kent's Com. 477.

The future similar case is sometimes expressed to be literally the same case with the precedent.¹ or to fall within it, and to be not distinguishable from it;² or to be directly the same case as it is.³ The precedent is sometimes expressed to be a decision precisely, exactly, or directly, in point;⁴ or such a case, that there is no distinguishing it from the present case;⁵ or a case quite similar to the present;⁶ or a case, of which the facts "cannot be distinguished in effect from those of the present case;"⁷ or a case, "which must govern the present, to which it closely applies;"⁸ or a case, "that must govern the present, for it stands directly on the same ground in every word and circumstance."⁹

[It is not meant that the facts and circumstances in the case to be decided must be the same as those of the case in which the decision was rendered. It is enough, if they raise the same questions of law; if they cannot be distinguished in principle; if the points raised in the latter case necessarily came up to be decided in the former, so that it could not be disposed of without passing upon them; and they were actually passed upon by the court. In other words, it is only essential that the principles necessary to be decided, in order to dispose of the latter case, should have been passed upon in the former, not "*obiter*," but necessarily in deciding the case.¹⁰

[Ch. Justice Sharswood says: "It is not possible to lay down, with mathematical precision, any rule in

¹ Dougl. 326, ed. 1783, 340 a, 4th ed.

² 3 Barn. and Cr. 798.

³ 2 Maule and S. 581.

⁴ 6 East, 512; 1 Maule and S. 696, 697; 14 Ves. 596; 19 Ves. 314; 1 Younge, 22; 2 Anstr. 357.

⁵ 6 Maule and S. 47; 9 Bing. 672.

⁶ 2 Barn. and Ald. 56.

⁷ 3 Barn. and Adol. 36.

⁸ 6 East, 513.

⁹ 1 East, 541.

¹⁰ 2 Bing. 229; 6 Gray, 494, 495; 6 Wheaton, 399.

regard to the authority of precedents. How far previous determinations ought to be regarded as definitely settling any point or principle of law will depend very much upon circumstances. The character of the court, and of the times in which such decisions took place, will have its weight; and not a little, after all, will depend upon the time and tendency of prevailing opinions.”¹

[“We ought not,” says Chief Baron Pollock, in *Edwards v. The Camerons R’way Co.*,² “needlessly to question the recent decision of a court of concurrent jurisdiction.” “It is the function of a judge,” says Coke, not to make, but to declare the law according to the golden metewand of the law, and not by the crooked cord of discretion.”³

[The reasons assigned for a strict adherence to precedents are many and cogent.

[It is said, the law should be certain and stable, else how can it be known; with what safety could lawyers advise, or clients act upon their advice? what security would there be for vested rights, that often it is of most importance that a rule should be fixed and stable, than that it should be strictly just?

[“*Misera est servitas, ubi jus vagum aut incertum*,” that when a rule has been declared, become well-known, been generally acted upon, and, under it, rights have been acquired, it ought not lightly to be disturbed, because of the confusion, entanglements, and even suffering, which would ensue.

[“*Omnis innovatio plus novitate perturbat, quam*

¹ Shars. Black, p. 70 n, 11.

² 15 Jurist, 470.

³ Chief Justice Pemberton is reported to have boasted, that while he

was a judge, he had for his own share made more law than kings, Lords, and Commons, since the time he was born.

utilitate prodest;" and again, that to weaken the binding force of the precedents would leave too much in the breast of the judge. "It is the duty of the court '*jus dicere et non jus dare.*'" "*Optima est lex, quæ minimum relinquit arbitrio judicis, optimus judex, qui minimum sibi.*"

[Respect for precedents alone can secure the stability and uniformity of the law. Without such respect, it would be a shifting quicksand. Decisions are evidence of what the law is—a long series of consistent decisions the highest evidence which the nature of the subject admits. Blackstone says, "Precedents and rules must be followed, unless flatly absurd or unjust." Christian says, "even when they are flatly absurd or unjust, if they are agreeable to ancient principles." Judges have often said—"It is our duty '*stare decisis,*' but if this were '*res integra, res nova,*' we might hold very differently."

[When the rule, as settled by the current of judicial opinion, has seemed to work a hardship, it has often been changed by legislative enactments, and, doubtless, where a rule is of long standing and sustained by an unbroken series of decisions, this is the better method.¹

[While law should not be shifting, vague, or uncertain, any attempt to render it absolutely unchanging would be as unwise and impolitic as unsuccessful.

[All things about which the law concerns itself are ever changing. New complications will constantly arise, and, then, how apply precedent to the unprecedented; how apply the rule which at the time of its

¹ The decision in *Smith v. Wilcox*, 24 N. Y. 353; holding that a contract to advertise in a newspaper published

on Sunday was void, occasioned the law of 1871, c. 702, declaring such a contract legal.

inception was judicious, but now works only hardship? In such cases, "*summum jus*" might be "*summa injuria*."

[Always to defer to precedent would be practically to assert the infallibility of the judge who rendered the first decision. And that judges have not, in fact, always awaited the action of the Legislature, is sufficiently established by the numerous volumes of reversed cases in the libraries, and the list of doubted and overruled cases in the digests.]

A precedent possesses the binding force mentioned, either if, in the mind of the court, it is wholly unimpeachable, on the ground of want of principle, or otherwise;¹ or, if impeachable, the objection to which it is so exposed is not, in the consideration of the court, sufficient to exclude its title to be authority.²

A circumstance that strengthens the authoritative force of a decision is, that it has stood as law for a length of time,³ as "for forty years together,"⁴ or nearly forty years,⁵ or nearly thirty-four years;⁶ or that it was decided "after consideration,"⁷ "on great consideration,"⁸ or by "most learned judges;"⁹ that it underwent grave consideration by a court, which at the time was filled by very learned judges.¹⁰

["Although an old decision, which has been long followed as having settled the law, may be shown to have proceeded on a wrong view of what the case

¹ 6 Durn. and E. 644, 645; 1 East, 541; 6 East, 512, 513; 2 Eden, 343; 3 Ves. 313.

² Dougl. 326, 327, ed. 1783, 340 a, 4th ed.; 13 East, 321; 3 Bing. 391; 3 Ves. 313; 14 Ves. 596; 2 Sim. 271.

³ Jacob, 461.

⁴ 2 Swanst. 422.

⁵ Dougl. 326, 327, ed. 1783, 340 a, 4th ed.; 13 East, 321.

⁶ 5 Durn. and E. 450.

⁷ 6 Durn. and E. 656.

⁸ 6 East, 512.

⁹ 6 Bing. 22.

¹⁰ 7 Barn. and Cr. 476; 6 Maule and S. 46.

was, it cannot be disregarded.¹ When the law is established and settled, on whatever ground it was originally established, yet it ought to be adhered to.² But *Anon.*³ which stood for eighty-three years apparently unquestioned, was overruled in *Allen v. Dundas*,⁴ and it was said to carry its own death wound on the face of it.”]

A reason, constantly adverted to as a ground on which to adhere to a former decision, is, the importance of certainty in the law.⁵ Another reason is, “the great importance that there should be a uniformity of decision in the different courts of Westminster Hall.⁶ A third reason is, the probability that many transactions have taken place upon the footing of the former decision.⁷

[“That case was decided in 1828, and the correctness of the decision has not, that I am aware of, been called in question until the decision of the case at bar in the Supreme Court; and, as transactions may, and probably have occurred, and rights been acquired, with reference to the rule there adopted and enforced, the case should not now be overruled, unless a palpable error was committed. The doctrine *stare decisis* is a salutary one, and should not ordinarily be departed from, where the decision is of long standing, and rights have been acquired under it, unless considerations of public policy demand it. That decision was made after full consideration; and I am by no means prepared to dissent therefrom.”⁸ “If we

¹ *Baker v. Tucker*, 14 Jur. 771.

² *Mansfield, J., in Rex v. Wheatly*, 2 Burr. 1128.

³ *Comyns*, 150.

⁴ 3 T. R. 125.

⁵ *Dougl.* 326, 327, ed 1783, 340 a. 4th ed.; 2 Durn. and E. 24; 13 East,

322; 7 Barn. and Cr. 476; 2 Crompt. and M. 64; 2 Swanst. 414.

⁶ 6 Barn. and Cr. 533.

⁷ *Dougl.* 327, ed. 1783, 340 a, 4th ed.; 5 Durn. and E. 450; 6 Bing. 24.

⁸ *Hoyt v. Martense*, 16 N. Y. 233.

adhere to the decision of the Supreme Court, the ruling in that case is decisive of this.”^{1]}

A single case has been adhered to in, among other instances,² the following cases, which, with the judicial opinions there expressed, are a fit illustration of the subject of the present section.

The first that may be mentioned is *Hodgson v. Ambrose*, where Lord Mansfield, speaking for the whole bench, observed: “Whatever our opinion might be upon principle and authorities, if the point were new, we all think that since this is literally the same case with *Coulson v. Coulson*,³ and that has stood as law so many years, it ought not now to be litigated again. It would answer no good purpose, and might produce mischief. The great object in questions of property is certainty, and if an erroneous or hasty determination has got into practice, there is more benefit derived from adhering to it, than if it were to be overturned. Many estates may be enjoyed under the authority of *Coulson v. Coulson*, the titles to which would be shaken, if the decision in that case

¹ *Foster v. Cronkhite*, 35 N. Y. 143.

² *Petrie v. Hannay*, 3 Durn. and E. 418; *Howard v. Castle*, 6 Durn. and E. 642; *Higgs v. Warry*, *ibid.* 654; *Simpson v. Hanley*, 1 Maule and S. 696; *Doe v. Peach*, 2 Maule and S. 576; *Jowett v. Charnock*, 6 Maule and S. 45; *Maxwell v. Jameson*, 2 Barn. and Ald. 51; *The King v. Inhab. of Coleorton*, 1 Barn. and Adol. 25; *Doe v. Featherstone*, *ibid.* 944; *Doe dem. Tindal v. Roe*, 2 Barn. and Adol. 922; *Wells v. Hopwood*, 3 Barn. and Adol. 20; *The King v. Brettell*, *ibid.* 424; *The King v. Inhab. of Leeds*, 4 Barn. and Adol. 248; *Dougal v. Kemble*, 3 Bing. 383, 11 Moore, 250; *Fox v. Bishop of Chester*, 6 Bing. 1; *Wright*

v. Wright, 7 Bing. 457; *Grove v. Aldridge*, 9 Bing. 428, 2 Moore and Sc. 568; *Bowyear v. Bowyear*, 9 Bing. 670; *Swannock v. Lyford*, Ambl. 6; *Hill v. Adams*, S. C., 2 Atk. 208; *Moor v. Hawkins*, 2 Eden, 342; *Davies v. Topp*, 1 Bro. C. C. 524, cited 2 Bro. C. C. 262; *Colpoys v. Colpoys*, Jacob, 451; *Wilkinson v. Atkinson*, 1 Turn. and R. 255; *Anon.* 4 Russ. 473; *Teale v. Teale*, 1 Sim. and St. 385; *Bradford v. Belfield*, 2 Sim. 271; *Bown v. Child*, 3 Sim. 457; *Earl of Lonsdale v. Littledale*, 2 Anstr. 356; *Ravald v. Russell*, 1 Younge, 9; *Bozon v. Williams*, 2 Younge and J. 475.

³ 2 Atk. 246.

were to be overruled, and the case is so generally known among conveyancers, that it is impossible there should be many held under the contrary construction, because, if there were, they would have been controverted.”¹ 2. A second instance is, *The King v. Younger*, a case on the statute of 29 Charles II, ch. vii, against the exercise of any worldly labor or business on the Lord’s day, and in which case Lord Kenyon said: “Thirty-four years have nearly passed since the decision of the case of *Rex v. Cox*,² which informed the public that all bakers have a right to do what is imputed to this defendant as an offence. This circumstance alone ought to have some weight in the determination of this case. It would be cruel not only to the defendant, but also to those in a similar situation with him, if we were now to punish him for doing that which the Court publicly declared so many years ago might be done with impunity, and which so many persons have been doing weekly for such a number of years.”³ 3. In *Schumann v. Weatherhead*, Lord Kenyon observes: “Among the many cases which we have been called upon to decide upon applications for setting aside annuities, none contains a more convenient rule of decision than that which was laid down in *Greathead v. Bromley*.⁴ . . . Now, unless we are prepared to rescind our opinions then expressed, that case must govern the present; for it stands directly on the same ground in every word and circumstance. . . . And though, if we had then been as fully apprised of all the circumstances as now, it might have altered our opinion; yet it is

¹ Dougl. 323, 326, ed. 1783, and 337, 4th ed.; and see the certificate in this case.

² 2 Burr. 787.

³ 5 Durn. and E. 450.

⁴ 7 Durn. and E. 455.

better, for the general administration of justice, that an inconvenience should sometimes fall upon an individual, than that the whole system of the law should be overturned, and endless uncertainty be introduced. I should be sorry to see one decision in 1798, and a different decision on the same facts in 1801." Grose, Lawrence, and Le Blanc, Justices, "considered the question as concluded by the authority of the case of *Greathead v. Bromley*, and that the matter having passed *in rem judicatam*, the merits of the case could not now be entered into."¹ 4. *Liverpool Water Works Company v. Atkinson* was a case on the construction of a bond, and here Lord Ellenborough said: "The case of *Lord Arlington v. Merricke*² runs on all fours with the present. . . . That case was decided by Lord C. J. Hale, and other judges, on great consideration. Then, with a decided case exactly in point, it would be extraordinary if we were to apply a different rule of construction; though if it were to be decided now for the first time, I should think that decision right."³ 5. In *The King v. Deptford*, a case on a pauper's settlement by renting a tenement, it is observed by Lord Ellenborough: "If we were sitting to hear the case of *The King v. Framlingham*⁴ now argued, the argument might have weight; but it having been settled nearly forty years ago, that the rent reserved (all fraud apart) is to be taken as the criterion of the value of the tenement, without reference to the payment of the rates and taxes by the landlord, we are not now at liberty to disturb that decision upon any speculative opinion." And Grose, J., said,—"*It is better stare*

¹ 1 East, 541.³ 6 East, 511.² 2 Saund. 411.⁴ Burr. S. C. 748.

decisis. The very case has been already determined." And Bayley, J.,—"There is quite uncertainty enough in settlement cases; and when a point has been once decided, it is better to adhere to the decision."¹ 6. In *Tabay v. Lloyd*, "The whole court were of opinion that this case fell within the decision in the case of *Lawrence v. Aberdein*;² and Littledale, J., said,—“He doubted whether he should have concurred in the decision in the case of *Lawrence v. Aberdein*, but that he thought this case was distinguishable from it.”³ 7. *Payle v. Bird*, an action on a bill of exchange, contains his opinion expressed by Lord Tenterden:—"I should certainly have entertained some doubt whether this case fell within the statute, 1 and 2 Geo. IV, ch. lxxviii, had it not been for the authority⁴ cited on behalf of the plaintiff. . . . It is of great importance that there should be a uniformity of decision in the different courts of Westminster Hall upon all questions, but particularly upon questions affecting negotiable instruments of this description. Upon the authority of that case, therefore, we are of opinion that the rule for entering a verdict for the plaintiff should be made absolute."⁵ 8. A further instance is, *Williams v. Germaine*, where, on an objection taken in arrest of judgment, Lord Tenterden observed,—“In support of the objection, counsel relied on a case in 16 East, *Hoare v. Cazenove*. That case underwent grave consideration by this court, which, at that time was filled by very learned judges, the assistance of one of whom we have the satisfaction of having at the pres-

¹ 13 East. 321; cited 1 Barn. and Ald. 735.

² 5 Barn. and Ald. 107.

³ 3 Barn. and Cr. 798; 5 Dowl. and Ry. 641.

⁴ *Selby v. Eden*, 3 Bing. 611.

⁵ 6 Barn. and Cr. 531; 9 Dowl. and Ry. 639.

ent moment. In the course of the argument, much was addressed to us to show that that judgment ought not to have been given. If we could have been convinced that a judgment, given even by persons of the description to which I have alluded, was founded on a mistake of the law, it would have been our duty to have decided contrary to it; but we ought not to overrule a solemn decision of the court, unless we perfectly concur in saying that such judgment was founded on a mistake. It is of great importance in almost every case, but particularly in mercantile law, that a rule once laid down and firmly established and continued to be acted upon for many years should not be changed, unless it appears clearly to have been founded upon wrong principles. . . . We think that we are bound by authority, and I am inclined to say by reason, to confirm the decision in *Hoare v. Cazenove*.”¹

9. A case containing Lord Eldon’s opinion is, *Townley v. Bedwell*, where, the precise question having been decided in a former case, his lordship on following this decision, observed,—“That case was very much argued; and I do not mean to say, that a great deal may not be urged against it; but where there is a decision precisely in point, it is better to follow it.”²

[10. A further instance is, *Re Bonaffe*.³ “The principle, it is true, was not affirmed by the latter court, the judgment of affirmance having been put upon a ground which avoided that question. But the question is not open for a re-examination in this court, and without considering it upon its merits, I prefer to rest my decision upon the doctrine of *stare decisis*.” 11. Again, in

¹ 7 Barn. and Cr. 468; 1 Mann. and Ryl. 394, 403.

² 14 Ves. 591, 596.

³ 33 Barb. 480.

Curtis *v.* Leavitt,¹ the court says,—“The decision being directly in point, must be regarded as conclusive.” 12. In Clarke *v.* City of Rochester,² the language of the court is: “The court of last resort has said that the legislature had no power to submit a statute to the electors. . . . I confess that the restriction appears, to my mind, rather a judicial than a Constitutional one; but I am not at liberty so to hold, and have no desire to evade the just force and authority of that decision. If that court were in error, as it is not impossible they may have been, in that decision, it is their province, and not ours, to correct it. I find myself constrained, therefore, by the rigor of the maxim *stare decisis*,” and, 13. In Baker *v.* Lorillard,³ Justice Harris says,—“I have no reason to doubt the soundness of this decision, but whatever may be its merits, I agree with the court below, that it must be regarded as the law of this case. If there be anything valuable in the maxim, *stare decisis*, this is pre-eminently a case for its authoritative application. This court is the substitute and successor of the Court of Errors. It may, and undoubtedly ought, when satisfied that either itself, or its predecessor, has fallen into a mistake, to overrule its own error. I go farther, and hold it to be the duty of every judge and every court to examine its own decisions, and the decisions of other courts without fear, and to revise them without reluctance. But when a question has been well considered and deliberately determined, whatever might have been the views of the court before which the question is again brought, had it been *res nova*, it is not at liberty to disturb or unsettle such decision, unless impelled by ‘*the most cogent reasons*.’ ‘I cannot

¹ 15 N. Y. 223.² 24 Barb. 509.³ 4 N. Y. 261.

legislate,' said Lord Kenyon, 'but by my industry I can discover what my predecessors have done, and I will tread in their footsteps.'" 14. "It is sufficient," says Justice Paige, in *Curtis v. Leavitt*,¹ "for the present, to say that the principle of *stare decisis* stands in the way of re-agitating the question." A judge will often refuse to overrule a previous decision, although it conflicts with his own views on the subject. Thus, in *Story*, in *Brennan*,² Chief Justice Denio says,—“If I had been a judge in *Ruckman v. Pitcher*, I should not have concurred in the decision of the court. But the point having been deliberately determined, we are bound to apply the law thus settled to the present and all subsequent cases.” 15. In *Oakley v. Aspinwall*,³ on a second appeal, where the question presented was identical with that on which the cause was previously decided by the court, it was held that the court would not reconsider and depart from its former adjudication, although its members were not unanimous in making that decision, and the reasoning of those who concurred was not in harmony. 16. In *Barnes v. Ontario Bank*,⁴ the court were asked to disregard the case of *Safford v. Wyckoff*,⁵ because it was decided by a small majority against the opinions of Chancellor Walworth and Senator Paige. To this Justice Allen answered,—“It is said, upon the argument, that the decision in this case was, by a small majority, against the opinions of Chancellor Walworth and Senator Paige, and ought not to be binding upon the present court. It is true, that Chancellor Walworth did dissent from the conclusions to which the majority arrived. But, in deliv-

¹ 15 N. Y. 184.⁴ 19 N. Y. 165.² 15 N. Y. 527.⁵ 4 Hill, 442.³ 13 N. Y. 500.

ering his opinion, he concedes that the section does not, in fact, include a class of contracts that are never, in fact, made by the association, but which arise by operation of law merely, as in the ordinary case of an implied assumpsit to repay moneys deposited with the bank." "In such case," he says, "the certificate of the cashier or teller, or the entry in the pass-book of the customer, *is not a contract*; it is only *evidence* of a fact, which might be proved by parol, to raise an implied promise by operation of law." And Senator Paige, who delivered an opinion in that case, in accordance with the views of the Chancellor, remarks, in his opinion in *Curtis v. Leavitt*,¹ that the opinions of Senators Hopkins and Bockee, in *Safford v. Wyckoff*, especially since the decision of this court in *James v. Patten*,² must be presumed to have been adopted by a majority of the court, and must be regarded as conclusive upon the principle of *stare decisis*. It appears to me, therefore, that the point which we are discussing has been well settled by the decision of the highest State court; and, to use the words of one of our brethren, in *Towle v. Forney*,³ "we cannot do otherwise than follow it." 17. In *Leggett v. Hunter*,⁴ Justice Allen says,—"*In Jackson v. Babcock*,⁵ and *Towle v. Forney*,⁶ the decision of the Court of Errors in *Cochran v. Van Surloy*,⁷ was upheld upon the principle of *stare decisis*, both which cases are, I think, conclusive."]

A single case so followed is sometimes one, by which an older decision has been overruled;⁸ as in *Roe v. Rashleigh*, where, with reference to *Hennings*

¹ 15 N. Y. 222.

² 6 N. Y. 15, 16.

³ 14 N. Y. 429.

⁴ 19 N. Y. 463.

⁵ 16 N. Y. 249.

⁶ 14 N. Y. 423.

⁷ 20 Wend. 365.

⁸ See also *Maxwell v. Jameson*, 2 Barn. and Ald. 51, and *Burton v. Barclay*, 7 Bing. 761.

v. Pauchard,¹ it was said by Abbott, C. J.,—"That has been already overruled, after two arguments, in the case of *Freeman v. West*, upon reasons which appear to me to be quite satisfactory;" and by Bayley, J., "*Freeman v. West* is a direct authority in point, and the reason of the thing is in favor of that decision;" and by Holroyd, J., "The case of *Freeman v. West* seems to me to have been rightly determined, and I think it ought to govern our present decision."²

• An instance occurs, wherein Lord Hardwicke made a determination, which he believed to agree with a former decision, but ordered the matter to stand over that he might look for the case; and afterwards, on the authority of that case, he decided directly contrary to his former determination.³

Mere length of time since the decision of an earlier case does not weaken the authority of it. In *Cheetham v. Ward*, Eyre, C. J., said,—“The very point in issue was decided in the year book; and Brian there gives a satisfactory reason for the decision. . . . This case must be decided by the year book, and the principle there laid down, which has never been doubted since, whether founded in reason or not.”⁴

[In *Kightly v. Birch*,⁵ Lord Ellenborough, Chief Justice, overruled the case of *Bagge v. Bromuel*,⁶ saying “it had had its day, and it was time that it should cease.” And there being no modern authorities for a proposition, is a ground for hesitating as to following it: Thus in *Regina v. Ritson*,⁷ Chief Baron Kelly

¹ Cro. Jac. 153.

⁵ 2 Maule and S. 223.

² 3 Barn. and Ald. 156.

⁶ 3 Levinz, 99.

³ *Hume v. Edwards*, 3 Atk. 693.

⁷ 5 Law Rep. 204 Cr. Cas. Res.

⁴ 1 Bos. and P. 630. See also 9

Price, 612.

said: "During the argument I certainly entertained doubts on this question, *because most*, or, indeed, all, the authorities cited are comparatively ancient."]

SECTION II.

OF ADHERENCE TO TWO OR MORE DECISIONS.

As one decision may constitute a binding authority, so by greater reason may it be the duty of the courts to adhere to two, or a greater number of, decisions in point. Instances accordingly occur, wherein two,¹ or more,² decisions have been followed as authority. In a case where, in the Court of Chancery, Lord Eldon adhered to a decision by Lord Hardwicke, and another by Lord Apsley, his lordship made these observations,—“It is my duty to submit my judgment to the authority of those who have gone before me; and it will not be easy to remove the weight of the decisions of Lord Hardwicke and Lord Apsley. The doctrines of this court ought to be as well settled, and made as uniform almost as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case. . . I profess this principle, that if I find doctrines settled for forty years together, I will not unsettle them. I have the opinion of Lord Hardwicke and of Lord Apsley, pronounced in cases

¹ *Roe v. Jones*, 1 H. Bl. 30; 3 Durn. and E. 88; *Wright v. Barlow*, 3 Maule and S. 512; *Evelyn v. Evelyn*, Ambler 191; 3 Atk. 762; 1 Dick, 146; *Stebbing v. Walker*, 1 Cox, 250; *Ex-parte*

Ford, 7 Ves. 617; *Gee v. Pritchard*, 2 Swanst. 402, 414, 422.

² *Doe v. Wright*, 8 Durn. and E. 64.

of this nature, which I am unable to distinguish from the present. Those opinions have been acquiesced in without application to a higher court. If I am to be called to lend my assistance to unsettle them, on any doubts which I may entertain, I will lend it only when the parties bring them into question before the House of Lords.”¹ In the *King v. Thurmaston*, Taunton, J., said,—“In *Rex v. Deptford*, the judges, who expressed some doubts, still felt themselves bound by the authority of *Rex v. Framlingham*; and if so, *à fortiori*, we are bound by the two cases.”²

[There should be strong reasons for overruling previous adjudications, especially where there are several successive decisions, establishing the same doctrine.³ And *per* Paige, J., in *Curtis v. Leavitt*:⁴ “It is quite clear that this question has never been fully considered by this court; but inasmuch as it has been expressly determined by the court in two cases, I do not feel at liberty to disregard the determination, although I believe it to be erroneous, for I do not think that the correction of the error will compensate for the mischief of shaking the stability of the decisions of the court.”]

A determination, contrary to former decisions, may often produce the inconvenience of disturbing transactions that have taken place on the faith of those decisions;⁵ an inconvenience to which Lord Hardwicke in 1754 thus adverted in a case on the Statute of Distributions, and in which he followed two former decisions, the first of which was made in 1708:—“I would not be understood, that the argument of incon-

¹ *Gee v. Pritchard*, 2 Swanst. 414, 422.

² 1 Barn. and Adol. 735.

³ *Roane v. Hinton*, 1 Eng. R. 525.

⁴ 15 N. Y. 188.

⁵ 1 W. Bl. 264; 3 Bing. 599, 600.

venience alone has weight enough to decide the question, but it is a reason at least for not unsettling former determinations; and, if I were to vary in opinion, it would tend to alter distributions made since 1708, and disturb the peace of families.”¹ So with reference to the law, which, as between the heir and executor of a mortgagee, existed on the title to the mortgage money previously to the case of *Thornborough v. Baker*,² July, 1675, Lord Nottingham, in *Tabor v. Tabor*,³ November, 1679, and adhering to *Thornborough v. Baker*, and overruling a decree which, in *Tabor v. Tabor*, was made “about eleven years since,” and consequently before *Thornborough v. Baker*, thus speaks of the retrospective effect of the law settled by this case: “Because this has been long a controverted point, and was never fully settled till my time, as appears by *Thornborough* and *Baker*’s case, and the precedents then cited, *ergo*, it is not fit to look too far backwards, or to give occasion for multiplying suits; for God forbid, men should search the register’s files to find out how many decrees have been made for payment of mortgage money to the heir, and then stir up the executors or administrators to sue the heir for it again.”⁴ The same inconvenience of unsettling past transactions attracted the attention of Lord Kenyon in a case where he took occasion to speak of it in the following energetic manner: “If,” said he, speaking of a particular decision, “that shall be found to be a single case, and that the judges in deciding it departed from those rules that have guided conveyancers for ages

¹ *Evelyn v. Evelyn*, 3 Atk. 762, 765; Ambl. 194.

² 3 Swanst. 636.

³ 3 Swanst. 638.

⁴ 1 Ch. Cas. 283; 2 Freem. 143; 3 Swanst. 628.

past, then it will be most unfortunate for the public. The maxim, *Misera est servitus ubi jus est vagum aut incertum*, applies with peculiar force to questions respecting real property. In family settlements provision is made for unborn generations; and if, by the means of new lights occurring to new judges, all that which was supposed to be law by the wisdom of our ancestors is to be swept away at a time when the limitations are to take effect, mischievous indeed will be the consequence to the public.”¹

SECTION III.

OF DEPARTURE FROM ONE DECISION.

[GENERAL rules can never be laid down accurately at first. Experience only can point out the proper qualifications, limitations, exceptions, and relative bearings.] Hence² one decision may not be a binding authority, if the principle or reason on which it is grounded, or some other cause, makes it defective. In an after case, the soundness of the earlier decisions may be inquired into, and if on examination it is in the mind of the court thought to be unfit to stand, that decision it is allowed to reject as a binding authority.³ A decision may be so disregarded—if it is contrary to reason and common experience, and its effect would be to make confusion in property;⁴ or if it “outrages all reason and sense;”⁵ or if, it being a

¹ 8 Durn. and E. 503, 504.

² Hammond's Correspondence with the Revisers of the Statutes.

³ Vaugh. 383; Hardr. 52; Willes, 182, 240; 2 Barn. and Ald. 337; 2

Cox, 98; 8 Ves. 388; 9 Ves. 30, 34; 11 Ves. 529, 530; 19 Ves. 314; 2 Crompt. and M. 64.

⁴ Willes, 182.

⁵ 11 East, 570.

case which turned on the construction of the terms of a particular instrument, "the court ought there to have come to a contrary conclusion," "the court there had not adopted the true construction, nor that which was warranted by the ordinary rules of criticism or language;"¹ or if the judgment was "founded on a mistake of the law;"² or if it does not appear that, in the case decided, the attention of the court had been directed to a strong authority upon the point.³

[“When a single case stands, unsupported, and rests upon an unsound basis, or an erroneous application of principles, it is better, in the language of an eminent judge, ‘to abandon it than attempt to build upon it.’ Perhaps no general rule can be laid down on the subject. The circumstances of each particular case, the extent of influence upon contracts and interests which the decision may have had, whether it be only doubtful or clearly against principle, whether sustained by some authority, or opposed to all these, are all matters to be judged of whenever the court is called on to depart from a prior determination. When all this has been done, if no particular mischief is likely to ensue, we believe it to be our duty to decide according to our own convictions of the law.”⁴ The court is not absolutely bound by one case if the decision afterwards appears to be wrong.⁵ “If the case is one of *novelty*, that is, if it does not accord with the principles which constitute the pre-existing law, or especially if it is in conflict with them, and this is shown by a course of legal reasoning—it is, as a general proposition, not only the right, but the duty

¹ 1 Barn. and Ald. 330.

² 7 Barn. and Cr. 476.

³ 2 Maule and S. 277.

⁴ *Garland v. Rowan*, 2 Sme. and M. 631.

⁵ 1 Bishop's Crim. Proceed. §§ 1046, 1047.

of the court to decide in a way contrary to such former adjudication. This is termed, in the language of the law books, *overruling* the adjudication. And the reason of this is, that a court is always bound by *authority*, and authority does not consist of cases, but of principles."¹ "A large portion of the *legal opinion* which has passed current for law," said Lord Denman, in *O'Connell v. The Queen*,"² "falls within the description of law taken for granted," and, "when in the pursuit of truth, we are obliged to investigate the grounds of the law, it is plain, and has often been proved by recent experience, that the mere statement and restatement of a doctrine—the mere repetition of the *cantaleña* of lawyers—cannot make it law, unless it can be traced to some competent authority, and if it be irreconcilable to some clear legal principle."

[In *The People v. Vilas*,³ the court says: "The case of *U. S. v. Kirkpatrick*, 9 Wheaton, 720, is in apparent conflict with these views. There may be some distinction between this case and that, which does not occur to me. I do not find that case has ever been recognized or affirmed. I cannot consider it sound or practicable in the administration of the affairs of government." As was said by Cowen, J., in *Waydell v. Luer*,⁴ "Anomalies in the law . . . sometimes arise from blindly following the hasty decision of a distinguished judge." In *Commonwealth v. Wright*,⁵ the decisions in the cases of *Commonwealth v. Carey*,⁶ and *Commonwealth v. Parmenter*,⁷ and some other cases were disregarded because "evi-

¹ Bishop's First Book of the Law, § 98.

² 11 Cl. and Fin. 373, and see per Pollock Ch. B., 2 Hurls. and N. 139.

³ 3 Abb. Pra. Rep. 262 N. S.

⁴ 5 Hill, 453.

⁵ 1 Cush. 46.

⁶ 2 Pick. 47.

⁷ 5 Pick. 279.

dently decided without much consideration," and because "the precise question here raised does not appear to have been suggested to the court," and in *Lyon v. Mitchell*,¹ Justice Hunt, referring to the case of *Norris v. The Tool Co.*,² said, "I think the case was not well considered, and cannot adopt it as authority." And in *Oakley v. Aspinwall*,³ Justice Comstock says: "A case may easily be put in which a judgment would not be authority, either in a subordinate court, or in the one which pronounced it. If, for example, an appeal to this court involved distinct and separate defences to the action, such as usury, and the statute of limitations, and five of the judges should concur in a reversal, two of them placing their decision on the one ground, and three on the other, the judgment might be reversed, but nothing else would be decided. Such a determination of the appeal would be no authority, even in the same case." In overruling *Goodman v. Harvey*,⁴ the Superior Court of New York remark—"Either the maxim that it is the duty of judges *stare decisis* must be exploded as groundless, or cases which involve its flagrant violation must be disregarded." The case of *Bush v. Steinman*,⁵ after being cited and discussed, through a long series of decisions, sometimes deferred to as "fully supported by authorities, and by well established principles,"⁶ and as frequently mentioned to be criticised and doubted, its authority has come to be wholly denied, and it has been said of it—"no case which was once esteemed as authority has been more completely overthrown."⁷

¹ 36 N. Y. 243.

² 2 Wallace, 45.

³ 13 N. Y. 507.

⁴ 4 Adol. and El. 870.

⁵ 1 Bos. and Pul. 404.

⁶ 23 Pick. 24.

⁷ *Cuff v. N. and N. Y. R. R. Co.*, 9 Law. Reg. 541 N. S.

[In *Sparrow v. Kingman*,¹ the Court of Appeals of New York, in overruling some previous decisions of the Supreme Court of that State, said: "The error originated in a *dictum* of a judge, in an early case, and has been followed until the present time; recently, not because the error was not clearly seen by the judges of the Supreme Court, but for the reason that the rule had been conclusively settled for them by repeated adjudications of their predecessors. Here, however, the question is not *res adjudicata*, and we may reject the rule, if unsupported by principle or binding authority. Bronson, J., dissenting, said: "Questionable as I think this doctrine was at the first, it has prevailed too long to be now overturned by a judicial decision. If there is any good reason for changing the rule, the change should be made by the Legislature, and not by the courts."² The case of *Benjamin v. Benjamin*³ was decided by the Court of Appeals by a manifest oversight of a statute, and when cited in *Romaine v. Kinsheimer*,⁴ the court refused to be bound by it, saying: "If the error thus shown consisted of anything beyond that of a clearly mistaken reading of a statute upon a question of *jurisdiction alone*, we should not consider it open to review in this court, but would feel bound to adhere to it upon the doctrine of *stare decisis*. But as no particular principle of law is involved in that decision, beyond the reading of a particular statute, and as adhering to it would impose upon us the duty of entertaining appeals in proceedings where it is clear this court has no jurisdiction whatever, I am satisfied that the doctrine

¹ 1 N. Y. 246.

² 5 N. Y. 383.

³ See *Shoemaker v. Benedict*, 11 N. Y. 183, 191.

⁴ 2 Hilton, 521.

of *stare decisis* has no applicability to such a case, and does not preclude us from acknowledging so obvious an error, and hereafter disregarding it, as in any way binding."]

Chief Justice Willes, speaking of a case, wherein he fancied the reporter was mistaken, made this observation on it—"However, if this had been as Carthew reports, yet it is a single case, it is contrary to reason and common experience, and such a determination would make such a confusion in all the property of the people of this kingdom, that I own I should have no regard to it, but think that the contrary ought to be declared to be law."¹ And the same learned chief justice has said of a judgment of Lord Harcourt—"As it was a judgment given without any reasons, and directly contrary to the strongest reasons, that he himself had laid down but about a week before in the same case, it is a case that has no weight with me, for I will not be influenced by any judgment, that is founded either on fear or favor."² In a case where a defendant's gamekeeper had shot a dog of the plaintiff, and the question was, "whether the plaintiff's dog incurred the penalty of death for running after a hare in another's ground;" Lord Ellenborough forcibly said—"If there be any precedent of that sort, which outrages all reason and sense, it is of no authority to govern other cases."³ Lord Tenterden, characterizing a case as one that underwent grave consideration by the court, which at the time was filled by very learned judges, and adverting to observations made to show that the judgment there ought not to have been given, said, in continuation—"If we could have been con-

¹ Willes, 182.

³ 11 East, 570.

² Willes, 240; 5 Vin. Abr. 591.

vinced that a judgment, given even by persons of the description to which I have alluded, was founded on a mistake of the law, it would have been our duty to have decided contrary to it.”¹ In a case before Lord Eldon, his lordship said—“The case of *Dick v. Swinton* is precisely in point; but I do not say, that therefore, I should rely upon that authority, if I had any doubt as to the principle.”² [For “a rule established by a course of adjudications which is in conflict with legal principles—should not be extended.”³]

A court is at liberty to overrule a case, and accordingly instances occur wherein it has been overruled, although “no case can be entitled to more respect;”⁴ or it is an authority to which the court looks “with great respect;”⁵ or it is a “most solemn and deliberate opinion after great consideration,”⁶ or a “deliberate judgment;”⁷ or it is a modern case, as one determined sixteen, or eight, years ago.⁸

Instances of a case, which has been overruled by a later decision, are, amongst others:⁹ 1. *Rees v. Phil-*

¹ 7 Barn. and Cr. 476.

² 19 Ves. 314.

³ *Judson v. Gray*, 11 N. Y. 408.

⁴ *Aldrich v. Cooper*, 8 Ves. 390.

⁵ *Wallwyn v. Lee*, 9 Ves. 34.

⁶ *Ex-parte Young*, 2 Ves. and B. 244.

⁷ 2 Rose, 78 n.

⁸ *Lees v. Summersgill*, 17 Ves. 508, overruled by *Emanuel v. Constable*, 3 Russ. 436; *Milner v. Horton*, M'Clel. 647, by *Smith v. Compton*, 3 Barn. and Adol. 189, 199, 200.

⁹ *The King v. Rennett*, 2 Durn. and E. 197, overruled by *The King v. The Brewers' Comp.* 3 Barn. and Cr. 172, 4 Dowl. and Ryl. 492, cited 3 Barn. and Cr. 175; *Golding v. Dias*, 10 East, 2, by *Ricketts v. Lewis*, 1 Barn. and

Adol. 197; *Bishop v. Chambre*, 1 Dans. and Ll. 83, by *Jardine v. Payne*, 1 Barn. and Adol. 671; *Milner v. Horton*, M'Clel. 647, by *Smith v. Compton*, 3 Barn. and Adol. 189, 199, 200; *Eaton v. Jaques*, Dougl. 438, ed. 1783, 455, 4th ed., by *Williams v. Bosanquet*, 1 Brod. and B. 238, 3 Moore, 500; *Dickinson v. Shaw*, by *Dyer v. Dyer*, 2 Cox, 92; *Strode v. Blackburne*, 3 Ves. 222, by *Wallwyn v. Lee*, 9 Ves. 24; *Doddington v. Hallet*, 1 Ves. 497, by *Ex-parte Young*, 2 Ves. and B. 242, 2 Rose, 78 n.; *Lees v. Summersgill*, 17 Ves. 508, by *Emanuel v. Constable*, 3 Russ. 436. And, in bankruptcy, *Ex-parte Ogilby*, or *Ogilvy*, 3 Ves. and B. 133, 2 Rose, 177, by *Ex-parte Moore*, 2 Glyn and J. 166,

lip,¹ Lord Ellenborough, C. J., observing, "that it did not appear that the attention of the court had been directed in that case to Co. Litt. 148 b;" and Bayley, J., saying "that Co. Litt. was a strong authority upon the point."² 2. *Bage v. Bromuel*,³ Lord Ellenborough, on, it is not to be doubted, good ground, saying,— "that the case referred to had had its day, and that it was time it should cease."⁴ 3. *Payne v. Hayes*,⁵ which, it seemed to Abbott, C. J., could not be supported in point of principle; a case also which Mr. Justice Buller thought was not to form a rule of decision in future times; and in which opinion Abbott, C. J., most fully concurred.⁶ 4. *Robinson v. Tonge*,⁷ with reference to which Lord Eldon, on the occasion, when he overruled it, said,— "I feel it to be my duty to understand the principle of the case before I confirm it, or to decide against it upon a principle, stated from this place, [Court of Chancery,] so clear, that there can be no doubt upon it. . . . I cannot conceive the principle upon which that decision stands. . . . I have had an opportunity of communicating with Lord Redesdale upon this case, and have his lordship's authority to say, that he can reconcile it with no principle; that it was as great a surprise upon him, as it was upon me; and he considers it as a case standing altogether by itself, and not reconcilable to the principles which govern the court in a great variety of other instances. I have also the full concurrence of

cited *ibid*, 315; *Hankey v. Hammond*, 1 Cooke's Bank. L. 67, 8th ed. 78, by *Ex-parte* Garland, 10 Ves. 110, 1 Smith, 220, and stated from Reg. B. 3 Madd. 148 n., Buck, 210.

¹ Wightw. 69.

² *Doe v. Meyler*, 2 Maule and S. 276.

³ 3 Lev. 99.

⁴ *Kightly v. Birch*, 2 Maule and S. 533.

⁵ Bull. N. P. 145.

⁶ *Wickes v. Gordon*, 2 Barn. and Ald. 335.

⁷ 1 P. W. 5th ed. 680 n.

Lord Redesdale's opinion, that he would not determine according to that authority."¹

It is here observable, that a particular doctrine may be law, although the reason, which for that doctrine is "given in the books," is a bad one.² And a judgment may be well given, and ought to be affirmed, although the reasons given by the court for that judgment may not be approved of.³ [The judgment should not be reversed, said Chancellor Walworth, in *Hanford v. Archer*,⁴ because the judge gave an erroneous or insufficient reason for his decision.]

A particular decision, although disapproved of, and although a case which "made a noise in Westminster Hall at the time the judgment was given," may, "unless it establishes a rule productive of injustice and inconvenience," be one that ought not to be overturned, if it is upheld by the circumstances, that it is a decision which was much considered before it was pronounced, has remained unimpeached for more than forty years, and has been confirmed by a later decision; and "whatever conveyancers might have thought of the case, when it was first decided, they have since considered it as having settled the law, and it would be productive of much confusion to unsettle it again."⁵

Also a particular decision, although originally infirm, may become established law, and the doctrine it contains may be binding, by reason of a known consequence of the decision; as the circumstance, that "much property has been settled, and conveyances have proceeded upon the ground of that determina-

¹ *Aldrich v. Cooper*, 8 Ves. 382, 388, 390, 394.

² 1 Durn. and E. 34, [and see 22

How. Pr. R. 49; 15 Abb. Pr. R. 208.]

³ 1 Stra. 371.

⁴ 4 Hill, 273.

⁵ 2 Bing. 451.

tion;" a principle on which Lord Camden expressly decided *Morecock v. Dickins*.¹

["It is easy to see," said Johnson, Chief Justice, in *Leavitt v. Blatchford*,² "how the point may have escaped that close attention which it deserved. Under such circumstances, I do not think this court bound to persist in that which it sees clearly to be erroneous. Where a rule of property is erroneously settled, courts will rarely, if ever, depart from the decision, because such a departure will disturb rights acquired under the sanction of the rule; nor will they determine that to be criminal which has been decided, though erroneously, to be innocent. The reason of these rules has obviously no application, when the decision sought to be corrected is one which disappoints the expectation of the parties to an act, and renders void their contracts. There can have been no dealing between parties on the faith of any such rule. To alter such a decision does not disturb property nor interfere with any vested rights which the law is to regard; on the contrary, that course gives effect to the intentions of parties, and removes an obstacle which ought not to have been interposed in their way. A decision of the character of that in question stands, therefore, upon the general doctrine of *stare decisis*, unstrengthened by any peculiar considerations founded on the nature of the decision or the unjust consequences which might follow from its alteration. That maxim, although entitled to great weight, does not furnish an absolute rule which can never be departed from. That it does not, the number of overruled decisions which have accumulated in the administration of the common law, abundantly proves. To depart from a decision is undoubt-

¹ Ambl. 681.

² 17 N. Y. 543.

edly an act by which a court incurs a high degree of responsibility; and it should certainly be satisfied that its course is such that the future judgment of the enlightened profession of the law will approve its determination. But when it is satisfied that an erroneous determination has been made, and that, too, without a full consideration of the merits of the question decided: when it sees that to correct it will render void no one's honest acts, nor disappoint any just expectation: when, in short, it is fully persuaded that there is no one reason why such a decision should again be made, except that it was once made before, then I think a court would be sacrificing substance to shadow, if it refused to correct its error. Nor do I believe that by so doing a court would disturb the public confidence in the stability of its judgments. Courts are not inclined, any more than men out of courts, to admit that they have erred; and where the administration of justice is public, and must proceed upon reasons assigned for every judgment, there is little danger, from the exercise, under the responsibilities which necessarily attend its exercise, of the power which a court possesses to retrace its steps when it is satisfied that an error has been committed."

[Again, in *Harris v. Clark*,¹ Justice Gridley said,—
"In opposition to this doctrine, however, the case of *Wright v. Wright*,² is pressed upon us as an authoritative adjudication which we are bound to follow. We believe in a rigid adherence to the doctrine of *stare decisis*. We regard it as necessary to preserve the certainty, the stability, and the symmetry of any system of jurisprudence; and, therefore, if we had any reason to believe that the decision in this case was made upon

¹ 2 Barb. 101.

² 1 Cowen, 598.

deliberate consideration, and that the adoption of the reasons assigned by the judge was necessary to the decision of the questions before the court, we should certainly regard it as an authority binding upon us, and leave the errors, if any there were, to be corrected in the court of last resort. But we do not think the case of *Wright v. Wright* entitled to the authority of a judgment upon the point in question. The case itself was a non-enumerated motion, a decision upon which is never regarded as *res adjudicata*. The disposition of this class of cases is constantly made upon equitable considerations, which address themselves to the discretion of the court; and relief is frequently granted upon equitable terms, against the strict legal rights of the parties."

[In *The People v. Mayor of Brooklyn*,¹ Justice Brown said,—“The decision in *Livingston v. The Mayor of New York*,² was given in 1831, and the main point in controversy was, whether the lands taken for the street had not already been dedicated to the public use. Two opinions only were delivered, which relate almost exclusively to this branch of the case. The objection to awarding compensation in benefits to be derived from the improvement, was distinctly taken upon the argument. But the opinion of Senator Sherman barely alludes to it, while that of Chancellor Walworth (entering into no argument and quoting no authority) assumes, at once, the whole ground of controversy, and speaks of the right to make compensation in benefits, as a well-settled principle. We look into these opinions in vain for the evidence of that solemn argument and mature deliberation which, upon the doctrine of *stare decisis*, should

¹ 9 Barb. 543.

² 8 Wend. 85.

give to this case the weight of authority sufficient to foreclose the judgment of all other tribunals upon the same question. If Mr. Justice Bronson is not clearly right when he says, in *Butler v. Van Wyck*,¹—"It is going quite too far to say that a single decision of any court is absolutely conclusive as a precedent," he certainly does prove, by reference to numerous cases, that the Court for the Correction of Errors did not abide by its own decisions. I shall, therefore, treat the question of the validity of the power given to the defendants by the 40th section of the act to incorporate the city of Brooklyn, as one that is open and unsettled."

["The only question with me," said Justice Wells, in *Parsons v. Monteith*,² "is how far we are bound by the case of *Gould v. Hill*, and whether the maxim *stare decisis*, in consequence of it, is to govern the present case. It is the only reported case where this precise question has been decided in that way in this State. No case, that I am aware of, has followed it, affirming the doctrine. Nelson, then chief justice of this court, dissented from the decision. I am disposed, therefore, to think, in view of the great importance of the question and its connection with so large a branch of the commerce of the country, that we ought to take the responsibility of overruling it, providing we think it not in accordance with the settled law of the land."

[In cases of "*habeas corpus*, it is a well-known rule, that each court is accustomed, and indeed considers itself bound to exercise its jurisdiction according to its own view of the law."³ And in *Doyle v. Russell*,⁴ Justice Gould said,—“Were the point settled by a course of decisions, any where; did it not remain

¹ 1 Hill, 438.

² 13 Barb. 359.

³ *Re Timson*, 5 Law Rep. 261 Ex.

⁴ 30 Barb. 304.

standing upon a solitary case, which is itself not sustained by its citations, I might feel bound to submit, and to abide by the effect of the doctrine *stare decisis*, on the ground that what was so well settled must be right, although I might not be able so to see it. But where the liberty of the citizen is concerned, and no hardship is imposed upon the law, by compelling it to see that its own officers are faithful and competent, I think I am justified in saying that the case may go to a higher tribunal for a decision which I cannot see it right to give."

[By statute in Indiana, the State reporter is required to append to each volume of his reports a table of the overruled cases contained in it. Most of the volumes of the modern reports contain such a table, and these tables are reproduced in the Digests. The number of overruled and doubted cases in the English and American reports must, at the present time, exceed six thousand, and the number is still increasing.]

SECTION IV.

OF ADHERENCE TO A FIXED DOCTRINE.

[“THE point which has been often adjudged ought to rest in peace.”¹] When a doctrine is once fixed, as if it be so fixed by a decision, and subsequent practice grounded on it;² or by several decisions, and the course of practice established accordingly;³ or by “successive determinations;”⁴ or by a strong and uni-

¹ Cro. Jac. 527.

² 2 Barn. and Adol. 943.

³ Ambl. 680, 681; 1 Vern. 188.

⁴ 3 Atk. 763.

form train of decisions;¹ or by “a long series of authority;”² or by authorities, which, on one side, do in weight, number, and uniformity, very much preponderate over authorities standing on the other side of the question;³ the law is, and it is constantly with much force expressed—that, although if the matter were entire,⁴ *res integra*, a new case or point,⁵ it might admit of difficulty, or the judge would have his doubts;⁶ or although the doctrine is not “founded in good sense,”⁷ or is not “bottomed in reason,”⁸ or the court cannot understand the reason on which it is grounded,⁹ or the judge “cannot approve the reasons that others have given, or may not be able to assign a satisfactory one himself;”¹⁰ or “although the doctrine is not founded upon truly rational grounds, and principles, but upon legal niceties and subtilty;” or “notwithstanding one would wish, that no such rule had ever been established, and lament that such nice subtilties should have been admitted as the ground of it;”¹¹ or although the rule, when first raised, “went *satis ex arbitrio*,”¹² or although the series of cases, on which the rule or doctrine is based, were decided “certainly at not a very remote period;”¹³ or although the doctrine, applied to a particular case, makes it a very hard or unfortunate one;¹⁴ or whatever may be the court’s private opinion;¹⁵—yet, the doctrine being

¹ 1 East, 495.² 9 Ves. 433.³ 9 East, 70.⁴ 1 East, 493; 2 Ves. Jun. 427; 1 Mylne and K. 186.⁵ Ambl. 680, 681; Willes, 437; Cas. T. Talb. 80; 1 P. W. 91; 1 McClel. and Y. 590.⁶ Ambl. 680, 681; 1 Dick. 227, 229, 231; 1 Ves. Jun. 16.⁷ 2 Barn. and Adol. 944.⁸ 7 Durn. and E. 415.⁹ 1 McClel. and Y. 590; Ambl. 11.¹⁰ 8 Bing. 526, 537, 557.¹¹ 4 Burr. 1960.¹² 1 Ves. Jun. 407.¹³ 1 McClel. and Y. 599.¹⁴ Cowp. 192; 7 Durn. and E. 415, 419; Willes, 98.¹⁵ 9 Bing. 643.

settled, or the point closed, it is to be adhered to.¹ ["It is not necessary now to say," observed Lord Kenyon, in *Thompson v. Charnock*,² "how this point ought to be determined if it were *res integra*, it having been decided again and again." "Influenced by these decisions, I feel myself," said Mr. Justice Keating, in *Cockle v. L. and S. E. R'w'y Co.*,³ "constrained rather against my own opinions to hold," &c. "We are deeply convinced," said Justice Duer, in *Randall v. Parker*,⁴ "without meaning to dwell upon the topic, that there can be no stable or consistent administration of justice, unless the decisions of the court of ultimate jurisdiction shall be implicitly followed and obeyed by all subordinate tribunals, and hence those decisions, when their grounds are distinctly understood, will always be regarded by us as conclusive evidence of the existing law."⁵ A question repeatedly decided is no longer open for discussion.⁶ "*Stare decisis*," said Chief Justice Spencer, in *Lion v. Burtis*,⁷ "is a maxim essential to the security of property; the decisions of courts of law become a rule for the regulation of the alienation and descent of real estate, and where that rule has been sanctioned and adopted in our courts, it ought to be adhered to, unless it be manifestly wrong and unjust." "It is essential to the security of property that a rule should be adhered to when settled,

¹ Willes, 183, 569; 4 Burr. 1960, 2564, 2565; 1 W. Bl. 264; 5 Durn. and E. 63; 7 Barn. and Cr. 148; 9 Bing. 643; 1 Vern. 188; Cas. T. Talb. 80; 1 P. W. 91; Ambl. 11; 1 Cox, 252; 1 Dick. 227, 229; 1 Ves. Jun. 1, 407, 408; 11 Ves. 537; 2 Jac. and W. 308; Jacob, 143; 1 Turn. and R. 62; 1 Russ. 426; 1 Mylne and K. 186.

² 8 T. R. 139.

³ 5 Law Rep. 468 C. P.

⁴ 3 Sandf. 72.

⁵ See, on the inconvenience that would result from an opposite course, *Yates v. Lansing*, 9 Johns. 428; *Hanford v. Artcher*, 4 Hill, 321; *Driggs v. Rockwell*, 11 Wend. 507.

⁶ *Wright v. Sill*, 2 Black. 544.

⁷ 20 Johns. 487.

whatever doubt there may be as to the grounds upon which it originally stood.¹ To hold otherwise would be to disturb and unsettle a vast number of titles within the State, which is a consideration entitled to much weight in giving the act an interpretation."² "The doctrine of *stare decisis* must retain some respect in the courts of this country, or the innovating spirit of the age will render very insecure the rights of persons and property."³ "It is dangerous to alter established forms. I will make no order, but leave parties to proceed in the old beaten path."⁴ *Via antiquas via tuta.*⁵]

A ground of such adherence is, the inconvenience of uncertainty in the law;⁶ an inconvenience, which, with regard to property, may affect every man, by the circumstance that "the ablest conveyancers may not be able to direct him."⁷ Another reason to adhere to a rule of real property is, that many estates stand or depend upon the rule;⁸ or the danger, that "the new determination should have a retrospect, and shake many questions already settled."⁹ "*Stare decisis* is a first principle in the administration of justice, and this not from any fear of bringing appeals or writs of error in particular cases: time guards them: but because these cases have furnished the light, by which conveyancers have been directed in settling and transferring property from one man to another. Upon the faith of

¹ Sir W. Grant, 18 Ves. 110.

² *Lynch v. Livingston*, 6 N. Y. 432.

³ *Calkins v. Long*, 22 Barb. 106.

⁴ *L'd Chan. Talbot, Hunter v. Murray*, Cas. Temp. Talbot, 196.

⁵ *Manning v. Manning*, 1 Johns. Chan. 530.

⁶ *Willes*, 437; 7 Durn. and E. 419,

420; 8 Durn. and E. 504; 1 Taunt 238, 239; 4 Bing. 241; 1 Ves. Jun. 17 1 McClel. and Y. 590.

⁷ 7 Durn. and E. 420. And see 2 P. W. 741.

⁸ 2 Bro. C. C. 149; 9 East, 70, 71. And see 1 Taunt. 239.

⁹ 1 W. Bl. 264; 8 Durn. and E. 504.

an established rule, and the acquiescence of judges, and of the whole nation in it, property to the amount of millions may depend. The judges now (as their predecessors have always done) bow down to the rule *pro salute populi*, which is the supreme law of every community.”¹

[“But it is not the province of this court,” said Justice Wright, in *Phillips v. Peters*,² “to unsettle the latter doctrine. When the consequences flowing from unsettling principles established by a long current of adjudications, are so extensive and wide-spread, and it may be disastrous, our plain duty is to be governed by the rule of *stare decisis*, leaving to the court of last resort to change the law.” And, per Baron, Gurney, in *Garland v. Carlisle*.³ “It is part of the infirmity of human legislatures that the general rule which they prescribe, will work hardship in particular cases, and it is for the legislature to afford such relaxation of the rule as can be done with safety.” “The question was regarded below as settled by a series of decisions.” “If this be so, it is equally binding upon this, as upon any other court.”⁴

[“When a rule has been once deliberately adopted and declared,” says Chancellor Kent,⁵ “it ought not to be disturbed, unless by a court of appeal or review, and *never* by the *same* court, except for very cogent reasons, and upon a clear manifestation of error; and if the practice were otherwise, it would be leaving us in a state of uncertainty as to the law.” “The rule having so long obtained with us, I do not think the

¹ By Wilmot, C. J., Wilm. notes, 312.

² 21 Barb. 359.

³ 2 Crompt. and M. 53.

⁴ *The People v. Vilas*, 36 N. Y. 463.

⁵ 16 Johns., 402; 20 *id.* 722, cited without crediting its source, 4 Duer, 599.

appellant's counsel has given us any sufficient reason for changing it, especially as the practice at the circuit in this respect has been expressly approved by the Supreme Court in *banco* for more than twenty years."¹

["Under the decisions of the court, which have been gradually but steadily advancing in that direction, I think," said Peckham, J., in *Walsh v. Sexton*,² "the proof should have been received, and that the judge erred in rejecting it. . . . In principle I think he was clearly right. But Lord Hardwicke, at an early day, sought to make a distinction as to a bond delivered without writing, which has been repudiated as unsound in principle, but has been steadily followed, and even extended in practice. . . . In my judgment, this doctrine is fraught with the greatest dangers. . . . The whole thing is wrong. But it is settled by authority, and we are not at liberty to reverse it." "If it were not for preserving and upholding the valuable maxim *stare decisis*, I should have no hesitation in holding that the question . . . was one addressed to the discretion of the court."³

["It struck me at first," said Lord Eldon, in *Gee v. Pritchard*,⁴ "as a point of considerable doubt. . . . If it was unprejudiced by decision, that doubt might be maintained by strong argument; but it is too late now even to state it, for there is authority binding my judgment entirely upon that."]

Adherence to a fixed doctrine has accordingly taken place in the cases mentioned in the margin.⁵

¹ *Waffle v. Dillenback*, 38 N. Y. 57.

² 55 Barb. 256.

³ *Cope v. Sibley*, 12 Barb. 523.

⁴ 2 Swanst. 402.

⁵ *Leving v. Calverly*, 1 Lord Raym. 330; *Bailiffs of Litchfield v. Slater*, Willes, 431; *Edmunds v. Povey*, 1 Vern. 187, cited 2 P. W. 494; *Morecock v. Dickins*, Ambl. 678; *Doe v.*

In these, the constantly occurring language of the bench is—"If all the authorities are wrong I am bound. . . . Upon the current of authorities, which have expressly decided the point, I think it too clear to be argued:"¹ "So strong and so uniform a train of decisions leaves no room for the court to exercise their judgment on the reasons on which they were founded. . . . The rule *stare decisis* is one of the most sacred in the law:"² "It is not a wise administration of justice to oppose a current of authorities where they are to be found. If we did so, we could not expect that the decisions of the present day would be more binding on posterity; and the rule of justice would be ever fluctuating, and uncertain. It is much wiser to adhere to prior determinations, although we cannot always understand the reasons on which they are grounded:"³ "If it had been *res integra*, I should doubt; but it is now *res judicata*; and *stare decisis* seems wisest. . . . Authorities established are so many laws; and receding from them unsettles property; and uncertainty is the unavoidable consequence. To the maxim of Lord Bacon cited at the bar, that not the decision, but the ground on which

Walton, Cowp. 189 (on which case, see Pugh v. Duke of Leeds, *ibid.* 714;) Goodtitle v. Otway, 7 Durn. and E. 399; Bishop of London v. Ffytche, 1 East, 487; Doe v. Manning, 9 East, 59; Leicester v. Lockwood, 1 Maule and S. 527; Jee v. Thurlow, 2 Barn. and Cr. 547, 4 Dowl. and Ry. 11; Brown v. Elton, 3 P. W. 202; Sparrow v. Hardcastle, Ambl. 224, 3 Atk. 798, 1 Dick. 256, 7 Durn. and E. 416, n.; Broadbent v. Shaw, 2 Barn. and Adol. 940; Ellis v. Smith, 1 Ves. Jun. 11, 1 Dick. 225; Clennell v. Lewth-

waite, 2 Ves. Jun. 465, 644; Hartley v. Hurle, 5 Ves. 540; Moggridge v. Thackwell, 7 Ves. 36, 68; Powis v. Burdett, 9 Ves. 428; Mills v. Farmer, 19 Ves. 483, 1 Meriv. 55; Langham v. Sandford, 2 Meriv. 6; Fitzgerald v. Field, 1 Russ. 416; Evans v. Rows and George, 1 McClel. and Y. 577, 12 Price, 76.

¹ By Lord Mansfield, 1 East, 494.

² By Buller, J., 1 East, 495.

³ By Alexander, C. B., 1 McClel. and Y. 590.

it stands, is to be regarded, I shall oppose the saying of Lord Trevor, a man most liberal in his constructions, that many uniform decisions ought to have weight, that the law may be known; and, to gratify private opinion, established opinions are not to be receded from.”¹ “Whatever the private opinion of a judge may be, it is safer to conform to established decisions, particularly in the House of Lords; but if not, yet the errors of great judges, acquiesced in by a succession of judges for a series of years, ought to be adhered to.”² “Had it been a new case, I should have doubted; but the cases and authorities are too strong to be got over. If mischief appear, the Legislature may interpose; but it is too much for the court.”³ [In *Morewood v. Hollister*⁴ is reported the decision of the judge in the Supreme Court, in which he says: “Constituted as this court now is, it becomes all important that we should adhere strictly to the principles of *stare decisis*, especially as it applies to the decisions of the late Supreme Court, so far as they have settled the law in a given case, and leave it to a higher tribunal or the law-making power to correct them if they are wrong.” “The opinion of the court, in *Williams v. N. Y. Cent. R. R. Co.*⁵ received the concurrence of six judges of this court, and the rule *stare decisis* precludes us from questioning its binding character as an authority in point.”⁶

[“What was said by Chief Justice Kent, in *Jackson v. Blanshan*,⁷ is peculiarly applicable to this case,

¹ By Lord Hardwicke, 1 Ves. Jun. 16, 17. The same saying of Lord Trevor is cited by Lord Hardwicke, Amb. 227, 228. See *Arthur v. Bockenbam*, Fitzg. 233, Cas. T. Holt. 750.

² By Sir R. P. Arden, 2 Ves. Jun. 474.

³ By Willes, C. J., 1 Dick. 229, 1 Ves. Jun. 13.

⁴ 6 N. Y. 315.

⁵ 16 N. Y. 97.

⁶ *Kelsey v. King*, 33 How. Pra. Rep. 45.

⁷ 6 Johns. 54.

viz.: It is important that when a question of this kind has become once settled, it should not be disturbed, for it grows into a landmark of property.¹ The maxim *stare decisis* and *non qujeta movere* is, to a certain extent, applicable to the decisions of all courts, particularly of the higher courts of law and equity. But in this court (court of errors), especially where nearly one-fourth of its members are annually changed, and by popular elections, the maxim that it is best to adhere to our decisions, and not to disturb questions which have once been put at rest here, should be permitted to have its full effect.”²

[“In *Seton v. Low*,³ this court decided that articles contraband of war were lawful goods within the meaning of that term in a policy of insurance. . . . In consequence of this decision, the clause in question was introduced into New York policies. . . . In *Suckley v. Delafield*,⁴ the construction in *Seton v. Low* was held conclusive.” “We are bound to presume that since that decision parties have acted with a full knowledge of the construction given to this clause in policies; and we should regret exceedingly if we were obliged, after the lapse of thirty years, to draw in question its soundness. If ever there was a case in which the court should feel bound by the maxim *stare decisis*, this is the case. A different construction now would shock and alarm the confidence of the commercial community.”⁵ “The current of authorities being thus strong, we must remember that *stare decisis* is a rule of no inconsiderable importance, if we wish to preserve the stability of judicial

¹ *Moore v. Lyons*, 25 Wend. 142.

⁴ 2 Caines, 222.

² *Driggs v. Rockwell*, 11 Wend. 507.

⁵ *Nelson, J. Amer. Ins. Co. v. Dunham*, 12 Wend. 466.

³ 1 Johns. Cas. 1.

decisions, and to relieve the law as much as possible from the reproach of uncertainty.”¹ “The decisions of this (Supreme) Court, while unreversed, always formed the absolute law of the case, and entered with very decisive effect into the body of precedents.” . . . “The court, almost always in deciding a question, create a moral power above itself; and now when the decision construes a statute, it is legally bound for certain purposes to follow it as a decree emanating from a paramount authority, according to its various applications in and out of the immediate case.”²

[Where an erroneous principle has been established by decisions, and individuals accepting it as settled law, have acquired rights under it, the court, after the lapse of many years, will hesitate long before overruling it, believing it better for the error to be corrected by the legislature than by the judicial power, “as all intervening rights would, in that case, be saved, and injustice be done to no one.”³

[“If a case,” said Lord Brougham, in *Baker v. Tucker*,⁴ “has been always supposed to be of one particular feature, aspect, and purport; and if that being uniformly supposed in subsequent cases to be such, and as such ruled those subsequent cases, it will not do to go back to some critical differences which may be raised respecting the authority of that case, because the law may have been settled. I will not even put it upon a wrong view of what the case was.”

[When a decision involving the title to real estate, and the construction of a statute, has been announced by a court of last resort, and has become a rule of

¹ *Elwell v. Shaw*, 16 Mass. 42; repeated in *Townsend v. Corning*, 23 Wend. 443.

² *Bates v. Relyea*, 23 Wend. 340.

³ *Emerson v. Atwater*, 7 Mich. 12, 23.

⁴ 14 Jur. 771.

property, it will be overruled only for the most cogent reasons, and upon the strongest conviction of its incorrectness.¹ The court refused to overrule a decision regulating the title to property by descent, established by a decision six years previously for the reason: "While we forbear to express any opinion as to the correctness of that decision, if the question were *res integra*, we are unwilling to unsettle titles which probably rest on its principles."²

[The court will not overturn a well-considered decision upon the constitutionality of a law, where valuable rights and interests have become vested under it, although they may consider it to be erroneous."³]

So great is the force of decisions which have taken place during a long period, as thirty years, or have otherwise become well established, that, although those decisions are a departure from an act of parliament, the courts are obliged to follow them, notwithstanding their effect is, to an extent, to repeal the act,⁴ or to tend "to render nugatory a most beneficial enactment, and to promote rather than lessen those evils, which it was the object of the legislature to prevent."⁵ Those decisions the courts may regret, but cannot overthrow: the only power of the courts is, to stop where they have stopped, and refuse to carry them a step further. "I am," it has been observed by Lord Eldon, "bound to say, that statute [of Frauds, 29 Charles

¹ Reichart v. McClure, 23 Ill. 516; and see Rogers v. Goodwin, 2 Mass. 475; Packard v. Richardson, 17 Mass. 122, 144; Opinion of the Justices, 3 Pick. 517.

² Bennett v. Bennett, 34 Ala. 53, 56.

³ Fisher v. Horicon Iron Comp. 10 Wis. 351.

⁴ *Ex-parte* Whitbread, 19 Ves. 209, 212; 1 Rose, 299; 1 West's Cas. T. Hardw. 185; 1 Russ. 589, 597, 598.

⁵ Reynolds v. Waring, 1 Younge, 350.

II. c. iii,] must not be repealed by me, further than it has hitherto been repealed by my predecessors, to whose authority I submit.”¹ And on a similar departure from the same statute, it is an observation of Alexander, C. B.,—“The cases in which the statute has been departed from are now too well established to be disregarded; and I can only express my entire concurrence with those who have declared, that the cases ought not to be carried a step farther.”² On the same subject there occurs, in *Cook v. Rogers*, the following passage relative to the Bankrupt Acts, and a debtor’s fraudulent preference of a creditor in contemplation of bankruptcy:—“I agree,” says Tindal, C. J., “in one observation, which has been made by the counsel for the defendant; that the whole doctrine of fraudulent preference has arisen rather by the contrivance of courts of law, than on the language of the Bankrupt Acts. . . . And Lord Eldon once stated in the House of Lords, that this was a bold doctrine when first started, and in some degree a fraud on the act of parliament; because, if the act were insufficient in that respect, recourse should have been had to the legislature; but that after a course of decisions for fifty years, it was too late to alter the rule. The doctrine, however, has at length crept into the statute law; for in the 6 Geo. IV, c. xvi, § 82, we find certain *bond fide* payments protected, ‘such payments not being a fraudulent preference.’”³

It may often be difficult to draw the line, at which it must be considered that a doctrine is settled, or a point closed, and, therefore, to be adhered to; or to say when it is not too late to review such doctrine or

¹ 19 Ves. 212.

² 7 Bing. 443.

³ 1 Younge, 350.

point. There may be a time when it is not too late to make that review. "My own personal experience tells me," says Graham, B., "that nothing is more common than that a legal notion, though founded on judicial decisions, may prevail for a series of years in Westminster Hall, as being the result of decided cases, which at length has been decided to be wrong, and when so discovered, has been corrected by subsequent determinations. The numerous cases of actions against married women, living separate from their husbands, afford instances of this. It has been held and determined, that a *feme covert*, living separate from her husband, was liable to be sued as a *feme sole*, till the Court of King's Bench, in *Marshall v. Rutton*,¹ decided otherwise after great consideration, notwithstanding the former decisions the other way, thereby overturning determinations which had, for upwards of twenty years, been considered as establishing so very important a point of law. . . . The case of *Moses v. Macferlan*,² again, was considered law for between thirty and forty years, till the court, reconsidering the grounds of that decision, overruled it altogether, and came back to the true principle, in the case of *Mariot v. Hampton*,³ where Lord Kenyon and the rest of the court, individually, refused to recognize the law of the former case, although very solemnly determined after mature consideration and an elaborate judgment."⁴

[*Wain v. Warlters* repeatedly disapproved, and particularly in 15 Vesey, 286, was unanimously

¹ 8 Durn. and E. 545.

² 2 Burr. 1005; 1 W. Bl. 219.

³ 7 Durn. and E. 269.

⁴ 12 Price, 135, 136; 1 M'Clel. and Y. 597, 598. See 1 Turn. and R. 100:

[We have before (*ante*, p. 202) referred to the case of *Anon.*, 1 Comyns, 150, which was overruled in *Allen v. Dundas*, 3 T. R. 125, after it had stood as law for over eighty years.]

affirmed in *Saunders v. Wakefield*,¹ and received for law in England, but not always in the United States.²

[“Even a series of decisions is not always conclusive evidence of what is law, and the revision of a decision very often resolves itself into a mere question of expediency, depending upon the consideration of the importance of certainty in the rule, and the extent of property to be affected by a change.”³ Upon this uncertainty in the rule of decision, it has been remarked by a recent writer,⁴ “The hardship caused by the existence of authoritative, but not fully and absolutely authoritative rules, is one which affects all who follow a decision, which is afterwards reversed, the mischief or hardship caused by the want of a power of laying down such rules, is thus left indefinite—it introduces a kind of lottery of justice.”

[“In *McMillan v. Vanderlip*,⁵ Chief Justice Spencer reviewed, criticised, and corrected the decisions of the English courts on the subject of part performance of a contract.”⁶ “I have entered into the case so fully, because I am desirous executors should know they are answerable for negligence or inattention to their duty, and that they cannot rely for their protection on the old cases on the subject.”⁷ The old doctrine that the action for money had and received is an equitable action, must be looked on as exploded.⁸ The principle advanced by Littleton and Coke, that a man shall not be heard to stultify himself, has been properly ex-

¹ 4 Barn. and Ald. 595.

² *Speyers v. Lambert*, 1 Swe. 339.

³ Cited in *The People v. Mayor of Brooklyn*, 9 Barb. 543.

⁴ *Considerations on Law*, London, 1871.

⁵ 12 Johns. 165.

⁶ Spencer, J., in *Moses v. Banker*, Superior Court, N. Y. May, 1871.

⁷ *Stiles v. Gray*, 2 U. S. Law Mag. 167.

⁸ *Miller v. Atlee*, 13 Jur. 431, Ex., 13 Law Times, 121.

ploded, as being manifestly absurd and against natural justice.¹ In Appendix III will be found some extracts from opinions on the propriety of courts, and particularly courts of last resort, adhering to their own decisions.]

SECTION V.

OF DISCORDANT DECISIONS, OR SERIES OF DECISIONS.

WHEN two decisions are contradictory, it is perhaps a proper general rule, to adhere in a third case to the later decision.² But, under some circumstances, the earlier case may be preferred; as if the latter case is not binding, because it was decided against principle, or was wrongly decided, or was not argued, or passed without discussion.³ And sometimes the authority of the first case may be so great, as to oblige the court to yield to and follow it. Thus, in *Barnes v. Crowe*, which stood over that the court might look into the cases, and particularly *Acherly v. Vernon*, and *The Attorney General v. Downing*, the Lord Commissioner Eyre, on delivering the opinion of the court, commences it by saying,—“Upon looking into those cases, the question, if it is not to be considered as determined, and so determined as that the court can hardly consider itself at liberty now to review it, would be a question of great difficulty; for it seems to me, that those two cases are in direct opposition to each other. The latter was determined by a very able

¹ *Webster v. Woodford*, 3 Day, 90;
Mitchell v. Kingman, 5 Pick. 431;
Hill v. Peet, 15 Johns. 503; *Ballew v.*
Clark, 2 Ire. Law Rep. 25.

² 4 Barn. and Cr. 589.

³ *Purcell v. Macnamara*, 9 East, 157.

judge in this court, and having the former before him, which increases the difficulty: but it seems to me, upon the best consideration, that the former case is so determined, and is of such authority, that every thing must yield to it. Therefore, unless it can fairly be distinguished, notwithstanding the great authority of the other, the point must be considered as decided by the first. That was a case of the highest authority, because it was originally determined here, by Lord Maclesfield, and his decree was affirmed by the House of Lords, after questions put to all the judges.”¹

When a uniform course of recent decisions differs from other decisions which have gone before it; as a general rule, it appears to be the duty of the courts, to adhere to, and not to alter, those recent cases.² In a case on marshaling assets to pay charity legacies, the Lord Commissioner Ashhurst said,—“He thought they [the Lords Commissioners] were bound by the recent cases, with respect to the question of marshaling; that it did not appear what was the reason of the turn in the cases, but as the decisions had taken that course, they could not alter them.”³ [“In this conflict of decisions we must yield,” said Ingraham, J., in *Burke v. Valentine*,⁴ “to the weight of authority.”]

[It is said, in *Clafin v. Wilcox*,⁵ that the courts in England, “as all courts ought to do, seem to fasten more upon the general current of the authorities—the principle evolved from all the cases, so to speak—than upon the peculiar facts of any particular case.”]

¹ 1 Ves. Jun. 495; 4 Bro. C. C. 7, 8.

² *Doe v. Webb*, 1 Taunt. 234, 238; *The King v. Ossett-cum-Gawthorpe*, 4 Barn. and Adol. 222; *Tabor v. Tabor*, 3 Swanst. 636; *Makeham v. Hooper*, 4 Bro. C. C. 153; *Evans v. Rowe*, 1 McClel. and Y. 577, 595; *Gascoyne v. Ed-*

wards, 1 Younge and J. 19, 21; *Balme v. Hutton*, 1 Crompt. and M. 262, 266, 272, 281, 282, 303, 304, 306, 308, 313, 322, 9 Bing. 471.

³ *Makeham v. Hooper*, above.

⁴ 5 Abb. Pra. Rep. 170, N. S.

⁵ 18 Vermont, 610.

Decisions sometimes differ in a way, that this duty of adhering to the recent cases may not be imposed on the courts. The precedents may so differ, that the courts may be obliged to overrule one class or another of them, and consequently be driven to a choice between them.¹ To such a state of the cases appears to refer this observation of Lord Kenyon :—"If the precedents clashed, and we were bound to upset one class of cases or another, I should be disposed to overturn those, that do not coincide with the reason and justice of the case."² And in a late most important case before the House of Lords, Vaughan, B., referring to the particular question, said,—“Upon this question the crown, as representing the public, in respect of the revenue, and an individual creditor, in right of his private claim, are at issue. For the subject, the cases of *Uppom v. Sumner*, and *Rorke v. Dayrell*, and for the crown, *The King v. Wells and Allnutt*, and *The King v. Sloper and Allen*, are relied upon as conclusive; and your lordships are constrained to elect by which of these decisions you will abide, for no sophistry of argument can reconcile them.”³ [“I am familiar enough with the antinomies of our jurisprudence,” said Senator Verplanck, in *Durant v. Supervisors of Albany*,⁴ to smile incredulously at the attempts so often made to reconcile contradictory decisions, and vindicate judicial infallibility.” And Mr. Justice Carr, in *Watkins v. Crouch*,⁵ concludes his judgment as thus,—“it will be observed that I have cited no cases in support of this opinion—not that I have not read and considered and

¹ *Giles v. Grover*, 9 Bing. 128, 175, 188, 203, 232, 279; *The King v. Ossett-cum-Gawthorpe*, 4 Barn. and Adol. 216; 1 Nev. and Man. 21.

² *Higgs v. Warry*, 6 Durn. and E. 655.

³ *Giles v. Grover*, 9 Bing. 203.

⁴ 26 Wend. 81.

⁵ 5 Leigh, 530.

puzzled myself with the multitude that were commented on in the argument; but because, finding them like the Swiss troops, fighting on both sides, I have laid them aside, and gone upon what seems to be the true spirit of the law." "There is, we confess, a considerable want of harmony in the decisions, nor shall we deny that there are some which must be rejected as wholly anomalous, if the law is ever to be settled in conformity to the views which we have expressed; but it is when the law has been rendered uncertain by the conflict of decisions, that it becomes emphatically the duty of judges to recur to those first principles of justice which lie at the foundation of positive law, and by the application of which its existing uncertainty may, generally speaking, be effectually removed. The law (in the beautiful language of Lord Mansfield), 'works itself pure' by the fresh streams which it draws from its original fountains of equity and reason."¹]

When late decisions have introduced a practice, which is contrary to all the former determinations on the subject, it may sometimes not be too late to review those late decisions, and see whether or not they are supported by principle. It may be allowed to recur back to the ancient practice, if the late decisions "proceeded on a mistake," if "the reason given for the late decisions is not a satisfactory one," "is not true;" and, by adhering to the modern practice, the court would "establish an inconvenient and an unjust rule, and would act against principle, and against all the authorities, except the late decisions."²

[In *Pell v. Ulmar*,³ the Court of Appeals dis-

¹ *Suydam v. Jenkins*, 3 Sandf. S. C. Rep. 626.

² *Mayor of Southampton v. Graves*, 8 Durn. and E. 590.

³ 18 N. Y. 139.

regarded a previous decision of the same court. *Olstead v. Elder*,¹ in no wise distinguishable in its facts, but because "we think it (the former decision) ought not to overrule our strong convictions of the correctness of the principles above laid down."

[Where there is a decision which stands alone, and is in conflict with a number of decisions, the single decision may be disregarded. Thus, in *Cole v. Jessup*,² Justice Selden remarked: "There is but a solitary decision, aside from that now under review, upholding the negative of this question, viz., *Dorr v. Swartwout*. But that case is in direct conflict with *Didier v. Davison*, *Ford v. Babcock*, and *Burroughs v. Bloomer*. I have no hesitation, therefore, in adopting the construction, in this respect, given to the statute in the three cases last referred to, rather than that adopted in *Dorr v. Swartwout*."

[Lord Kenyon, in *Porter v. Bradley*,³ doubted the soundness of the rule laid down in *Forth v. Chapman*; ⁴ but Lord Eldon, in *Crooke v. De Vandes*,⁵ said that Lord Kenyon's *dictum*, in *Porter v. Bradley*, went to shake settled rules to their very foundation, and that the decision in *Forth v. Chapman* must be supported.

["The decisions of the late Supreme Court on the question now under consideration, have not been uniform, and we are at liberty to adopt such rule as we think the law requires, without a material departure from the principle '*stare decisis*.' Notwithstanding the change which has taken place in the organization of this court, we feel every disposition

¹ 5 N. Y. 144.

⁴ 1 P. Wms. 664.

² 10 How. Pra. Rep. 527.

⁵ 9 Ves. 203.

³ 3 T. R. 143.

to abide generally by the decisions of our predecessors; both from the high respect which we entertain for their judicial character, and from our regard for the principle. But the ablest and best men may err; and if we occasionally overrule an extreme case, we but follow the example of those who have gone before us.”¹ “The mind, conscious of rectitude, has to us a higher charm than consistency of adjudication.”² If either of those cases, said Miller, J.,³ can be considered as deciding the question now before us, then “I think they are in conflict with the decisions of this court, as well as sound principles, and must be disregarded.”]

¹ *The People v. Judges of Dutchess*
&c. 2 Barb. 288.

³ *Craigh v. Rochester City R. R.* 39
N. Y. 412.

² 4 Sme. and M. 549.

CHAPTER XV.

OF DISTINGUISHING A PRESENT CASE FROM A FORMER CASE, OR OUT OF A SETTLED RULE OR DOCTRINE.

WHEN, by the course of time, or otherwise, a case decided is become settled law, the courts cannot reverse it.¹ This they cannot do, although it is an objectionable case;² as, if it is a case at which the profession have always wondered.³ On the contrary, if, on the occurrence of another and like case, the former embraces the present and similar one,⁴ or, in other words, is exactly in point,⁵ such former case decided is a precedent, to which a court is bound to adhere in deciding the case at present before it.⁶

[“We have just reason to boast of the leading causes of those defects, . . . an adherence to fixed rules, and a jealousy of judicial discretion. . . . Hence, precedents of adjudged cases, becoming authorities for the future, have been constantly noted, and form, indeed, almost the sole ground of argument in questions of mere law. But these authorities being frequently unreasonable and inconsistent, partly from the infirmity of all human reason, and partly from the imperfect manner in which . . . reporters have handed them down, later judges grew anxious to

¹ 4 Taunt. 736; 3 Atk. 68; 1 Meriv.

⁴ *Ibid.*

9.

⁵ 3 Atk. 422; 1 Ves. Sen. 1.

² 3 Atk. 68; 1 Meriv. 9.

⁶ *Ibid.*

³ 4 Taunt. 736.

elude, by impalpable distinctions, what they did not venture to overturn.”¹]

When it is desirable to withhold a present case from coming within the range of settled, but objectionable, law, a way to accomplish this desire, and a mode, which it may often be the duty² of the court to adopt, is, to distinguish the present case from the former case, or out of the rule or doctrine that constitutes the settled law, wished to be avoided. The courts constantly use the following, or similar, language:³ Lord Keeper Harcourt, in a case before him, naming a former one, *P. v. S.*, says: “That case is the only one which in any manner resembles this; but, as it seems far from being exactly parallel, I do not think myself tied up by it. . . . There being these material variations between the one case and the other, I think I am at liberty to determine this, as if the case of *P. v. S.* was out of the way.”⁴ Lord Hardwicke, adverting to a particular rule, observes: “The court have always shown some dissatisfaction at the rule, and endeavor, if there is any room to do it, to distinguish cases out of it. They have said, indeed, they would not break the rule, but, at the same time, have said they would not go one jot further, and have been fond of distinguishing cases since, if possible.”⁵ Lord Tenterden says: “I do not think the want of a satisfactory reason to be a sufficient ground for overturning a rule grounded upon the authority of de-

¹ Hallam's Middle Ages, vol. II, p. 469.

² *Stileman v. Ashdown*, 2 Atk. 480; *Kemp v. Mackrell*, 3 Atk. 812, 2 Ves. Sen. 579. Lord Hobart says: “Judges ought to be *astuti* to find out reasonable

distinctions to unreasonable rules.” *Amb. 11.*

³ 2 Ventr. 335; 1 P. W. 452, 709; 2 P. W. 99, 488, 492, 493; 2 Atk. 480; 3 Atk. 97.

⁴ 1 P. W. 135.

⁵ 3 Atk. 68.

cisions, and of a practice long continued. But when a question arises, whether such a rule shall be applied to a new case, I think the want of such a reason authorizes me to say, that it ought not to be so applied, if any distinction between the cases can be discovered.”¹ And Lord Eldon, observing on a particular doctrine, says: “The doctrine of equitable mortgage by deposit of title deeds has been too long established to be now disputed; but it may be said that it ought never to have been established. I am still more dissatisfied with the principle upon which I have acted, of extending the original doctrine, so as to make the deposit a security for subsequent advances. At all events, that doctrine is not to be further enlarged. . . . The cases on this subject have gone too far already; and I would be understood as saying, that I will not add to their authority, wherever the circumstances are such as to warrant me in making a distinction.”² [Thus, in *Williams v. Williams*,³ the court, referring to *Root v. Stuyvesant*,⁴ said it “is a precedent for similar cases” only. In *Wenchell v. Bowman*,⁵ it was said the case of *Shoemaker v. Benedict*⁶ ought not to be extended; and in *Harley v. Van Wagner*,⁷ a like remark was made respecting *Jackson v. Walker*.⁸ Again, see what is said, in *Weed v. Case*,⁹ as to applying cases only to a state of facts precisely similar to the facts in the case decided.

[“The language of a court must always be construed with reference to, and in connection with, the

¹ 7 Barn. and Cr. 195, 196.

⁶ 21 Barb. 448.

² 1 Meriv. 9; 19 Ves. 480; 2 Rose, 329.

¹¹ N. Y. 176.

⁷ 28 Barb. 110, 113.

³ 8 N. Y. 525.

⁸ 5 Hill, 27; aff'd 7 Hill, 387.

⁴ 18 Wend. 257.

⁹ 55 Barb. 548.

facts before it.”¹ The authorities on this point have been thus summed up: The language of a decision “is seldom, if ever, to be taken in a general sense, however general in the form of the expression, not mentioning exceptions or limitations. It should rather be understood as spoken in reference to the facts under consideration, and limited in meaning by those facts.”²

[Where the facts differ, the decision is not authoritative; thus, per Lott, J., in *Quin v. Lloyd*,³ “We are not to be controlled by a decision upon facts so materially different, in all respects, from those in this case.”

[In *Bailey v. Bancker*,⁴ the court assumed that Ch. J. Savage was in error as to the facts of the case of *Simonson v. Spencer*.⁵ No notice is taken of the fact that the two statutes are entirely different. It is in the recollection of one of us that *Simonson v. Spencer* was not cited or discussed on the argument of *Bailey v. Bancker*; nor was the difference between the statutes commented upon.⁶]

Agreeably with the above view of the subject, a distinction has been taken in each of these cases referred to in the margin.⁷ And in these and the like instances, the court leaves undisturbed, or at least

¹ 4 Sme. and M. 549.

² Bishop's First Book, § 452, citing Marshall, Ch. J., *Brooks v. Marbury*, 11 Wheat. 78, 90, 91; *U. S. v. Burr*, 2 Burr's Trial, 415; 4 Cranch, 470, 482, 488.

³ 41 N. Y. 353.

⁴ 3 Hill, 388.

⁵ 15 Wend. 548.

⁶ *Woodruff Iron Works v. Chittenden*, 4 Robertson, 417.

⁷ *Roe v. Tranmarr*, Willes, 682, 2

Wils. 75; *The King v. St. Mary's Leicester*, 1 Barn. and Ald. 329, 330; *Doe v. Bliss*, 4 Taunt. 735; *Webb v. Webb*, 1 P. W. 132; *Reresby v. Newland*, 2 P. W. 93, 100; *Brome v. Berkeley*, *ibid.* 484; *Blower v. Morretts*, 3 Atk. 772; *Kemp v. Mackrell*, *ibid.* 812, 2 Ves. Sen. 579; *Ex-parte Hooper*, 1 Meriv. 7, 19 Ves. 477, 2 Rose, 328; *Mountford v. Scott*, 1 Turn. and R. 274; *Scarman v. Castell*, 1 Espin. 270.

does not overrule, the law that it finds to be settled. And often the court, in express terms, shuns to unsettle this law, and confines itself to the taking of the necessary distinction;¹ in a case of which kind, Willes, C. J., said: "I choose, rather than contradict such great authorities, to distinguish the present case from them."²

The distinctions before considered relate to a settled law, that is deemed to be objectionable. A second class of distinctions belong to a settled law that is not impugned by the courts. This law is not impugned; and sometimes, on the contrary, the court expressly marks it with approbation;³ but when it is sought to extend it to a case, which, in its circumstances, is distinguishable from those embraced by the same law, the court frequently rests on that distinction, and refuses to carry the present doctrine beyond the limit to which it has reached;⁴ and this the court often does on the ground, that to extend the decision in a former case to the present circumstances is hurtful,⁵ or of a hurtful tendency;⁶ Lord Ellenborough in an instance of this nature saying—"In this case it is desired of us to extend the rule a step further, but I own I am afraid of so doing;"⁷ and Lord Eldon, in another instance, saying—"He should be extremely

¹ The King v. Christowe, 11 East, 100.

² Willes, 687.

³ 2 P. W. 380: 4 Barn. and Ald. 589.

⁴ Doe v. Benson, 4 Barn. and Ald. 588; Tolson v. Collins, 4 Ves. 491; *Ex-parte* Brightens, 1 Swanst. 3; *Ex-parte* Trew, 3 Madd. 372; The King

v. Lambe, McClel. 423, 424.—8 Ves. 496.

⁵ Doe v. Jessep, 12 East, 288; Townsend v. Lawton, 2 P. W. 379; Bricheno v. Thorp, Jacob, 300.

⁶ Doe v. Barford, 4 Maule and S. 10; Bricheno v. Thorp, above; Anon. 19 Ves. 321.

⁷ 4 Maule and S. 13.

careful not to break through the established rule ; considering the extent to which it might go.”¹

With regard to distinctions, which are called nice.² subtle,³ refined,⁴ thin,⁵ slight,⁶ slight and cobweb,⁷ too slender,⁸ although it would not be difficult to enumerate a very large number of them,⁹ yet nothing is more certain, than that, generally speaking, the courts view with much dislike distinctions of that nature.¹⁰ It is the express opinion of Lord Eldon, that “instead of struggling by little circumstances to take cases out of a general rule, it is more wholesome to struggle not to let little circumstances prevent the application of the general rule.”¹¹ And Lord Mansfield’s similar opinion, expressed in language more expanded, is thus mentioned with approbation by Best, C. J.:—“Lord Mansfield, speaking many years ago against subtilties and refinements being introduced into our law, said they were encroachments upon common sense, and mankind would not fail to regret them. It is time, he says, these should be got rid of: no addition should be made to them: our jurisprudence should be bottomed on plain broad principles such as, not only judges can without difficulty apply to the cases that occur, but as those whose rights are to be decided upon by them can understand. If our rules are to be incumbered with all the exceptions, which ingenious minds can imagine, there is no certain principle to direct us, and it were better to apply the principles of

¹ 19 Ves. 321.

² 2 Ves. Sen. 417; 19 Ves. 461.

³ 2 Jac. and W. 451.

⁴ 3 P. W. 286.

⁵ 8 Ves. 125; 17 Ves. 404.

⁶ 1 Ves. Jun. 184.

⁷ Ambl. 330.

⁸ 1 Ves. Jun. 184.

⁹ Ambl. 330; 1 Wils. 138; 2 Ves. Sen. 417; 8 Ves. 125; 17 Ves. 404; 19 Ves. 461; Jacob, 460.

¹⁰ 3 Atk. 422; 1 Ves. Sen. 1; 1 Ves. Jun. 184; 2 Jac. & W. 451; 3 Bing. 331.

¹¹ 6 Ves. 641.

justice to every case, and not to proceed to more fixed rules.”¹

Distinctions of a refined nature the courts have accordingly often refused to take; and sometimes expressly on the ground of the uncertainty and confusion, which they tend to create.² Cases, in which that refusal is found, are, amongst others³—1. *Cook v. Arnham*, where Lord Talbot said he was “unwilling to make any new, unnecessary, or refined distinctions, which would be to render the profession of the law a matter of memory, rather than of reason and judgment:”⁴—2. *Atkinson v. Turner*, where Verney, M. R., said—“The more general a rule is made the better: and it is very dangerous to run into niceties, to distinguish any particular case from a general rule, as it must necessarily breed uncertainty and confusion.”⁵—and 3. *Brydges v. Phillips*, in which was a question on exempting by will personal estate from the payment of debts, and where Sir W. Grant said—“There is no distinct difference between this case and *T. v. Lord N.* Very small differences may be pointed out; but such as would form no guide for other cases, and leading to puzzle and confuse, rather than to give assistance to those who may be called upon to advise as to the construction or frame of wills.”⁶

¹ 5 Bing. 153.

² 2 Atk. 41, 314.

³ *Attorney-General v. Tomkins*, Amb. 216; *Beauclerk v. Dormer*, 2 Atk. 314; *Smith v. Eyles*, *ibid.* 385; *Wheeler v. Bingham*, 3 Atk. 364; *Lee v. Cox*, *ibid.* 419, 1 Ves. Sen. 1; *Sparrow v. Hardcastle*, 3 Atk. 803, Amb. 226; *Tyrrell v. Tyrrell*, 4 Ves. 1; *Allen v. Anthony*, 1 Meriv. 282; *Knye v. Moore*, 1 Sim. and St. 51, 2 Sim. and

St. 260; *Nye v. Moseley*, S. C., 6 Barn. and Cr. 133, 9 Dowl. and Ryl. 165.

⁴ 3 P. W. 286. So Lord Cowper said, with reference to a distinction made in a case before him—“If such distinctions are to be admitted, and to become rules in law, the knowledge of the common law will become rather a matter of memory, than of judgment and reason.” 2 Vern. 733.

⁵ 2 Atk. 41, Barnard. Ch. Rep. 78.

⁶ 6 Ves. 570.

An observation that may in conclusion be made is, that refined distinctions, when settled, are to be adhered to. On this head Lord Eldon is express authority. Referring to a particular distinction, on providing by will for payment of debts, his lordship says—"That distinction, I admit, is thin; but by departing from distinctions, that are settled, a degree of uncertainty is produced, so that no one can advise upon a will, till the judgment of this court [Chancery] is had upon it. Therefore, whether the distinction is sound, or not, if it has been adopted in these cases, it is better to abide by it, than to examine whether it should have been established."¹

¹ *Harmood v. Oglander*, 8 Ves. 125.

CHAPTER XVI.

OF DECIDING ON PARTICULAR CIRCUMSTANCES.

A CHIEF character of the judgments delivered by the Courts of Westminster Hall is, that these courts approach by degrees to the establishment of a general proposition.¹ It does not, it is believed, often happen that a question of a general nature comes first to be decided. Particular circumstances supply cases for decision; and on those circumstances may, generally speaking, be raised two kinds of questions; one, bounded by the particular circumstances of the individual case; and another, which oversteps that boundary, and embraces generally any circumstances of the like nature.

An example of the first kind of, or limited, question is furnished by *Lee v. Munn*, where there occurred a question of an auctioneer's liability for interest, on a deposit paid to him on the purchase of an estate sold by public auction. The court decided against his liability; but, in so doing, expressly grounded their decision on the special circumstances of the case; and studiously abstained from deciding the general question of an auctioneer's liability to interest; a question which Dallas, J., observed had, "in many cases, been raised, but in none decided."² That general question,

¹ 2 Durn. and E. 73; 2 Bos. and P. 230; 1 Taunt. 366; 1 Ves. Sen. 42; 1 Atk. 343; 1 Meriv. 32; 3 Meriv. 146; 3 Swanst. 544, 617.

² 8 Taunt. 45; 1 J. B. Moore, 481; Holt, 569.

appears to have been decided in the later case of *Harrington v. Hoggart*;¹ where also the court decided against the auctioneer's liability. This case, therefore, is an example of a general, or the second kind of question, which has been mentioned.

Additional examples of a limited question, and decision on it, are furnished by the following, amongst other,² cases.—1. *Davies v. Powell*, where a distress for rent had been made of a lessee's deer, which were tame, in which he had a valuable property, and which were kept in his close, that was not a park by grant or prescription; and in which case "the single question, that was submitted to the judgment of the court" was, "whether these deer, under these circumstances, as they are set forth in the pleadings, were distrainable or not;" and where a general question would include deer in forests, chases, and legal parks. Willes, Chief Justice, in giving the opinion of the court, said:—"Without determining any thing with respect to deer in forests, and chases, or parks properly so called, concerning which we do not think it necessary to determine any thing at present, we are all of opinion that we are well warranted by the pleadings to determine, that these deer, under the circumstances in which they appear to have been at the time when this distress was taken, were properly and legally distrained for the rent that was in arrear."³—2. A second case is, *Pendock v. Mackinder*, where J. J., a witness to a will of land, had,

¹ 1 Barn. and Adol. 577.

² *Edwards v. Hodding*, 5 Taunt. 815; cited 8 Taunt. 55; *Brown v. Selwyn*, Cas. T. Talb. 240, 242; *Bishop of Winchester v. Beavor*, 3 Ves. 314; *Sitwell v. Bernard*, 6 Ves. 520; cited 1 Turn. and R. 238, 244; *Vere v. Loveden*, 12 Ves. 179; *Clayton's case*. 1

Meriv. 608; *Marquis of Bute v. Cuninghame*, 2 Russ. 300; *Crawshay v. Collins*, *ib.* 347; *Thompson v. Thompson*, 9 Price, 477; *Rogers v. Price*, 3 Younge and J. 28; *Marnell v. Blake*, 4 Dow, 248; *Lord Kensington v. Philips*, 5 Dow, 61.

³ Willes, 46.

at the time of publishing the will, been convicted of petit larceny, and in which case the question was, whether he could be deemed a credible witness within the Statute of Frauds, 29 Charles II, ch. iii; and where a general question would include persons convicted of manslaughter, and many other offences. And here Willes, Chief Justice, in delivering the opinion of the court, observed,—“There is but one single question, whether or not J. J. were a competent witness. And I shall confine myself to the question before us, because I have observed great mischiefs arise from judges giving *obiter* opinions. Therefore I shall not consider whether persons convicted of manslaughter, and many other offences can be witnesses either before or after they have had their clergy, but shall speak only to this single question, whether a person convicted of petit larceny be a competent witness or not.”¹

The decision of a limited question is a decision on the particular circumstances of the case.² Such a case is one, which, as it is expressed, is decided “on the special circumstances which compose it;”³ or “upon the very special circumstances thereof;”⁴ or that turns “entirely upon its peculiar circumstances;”⁵ or that is determined “upon its own ground, without any reference to the general question.”⁶ So to decide is the habit of the courts.⁷ In a case in the House of Lords, Lord Thurlow said,—“It is not usual in this House or in the courts of law, to decide more than the very case before them.”⁸ Adapting their language to the cause

¹ Willes, 665.

⁶ 12 Ves. 182.

² 3 Durn. and E. 34; 2 Ves. and B. 303; 2 Russ. 347.

⁷ 2 Durn. and E. 73; 2 Bos. and P. 230 n.; 3 Brod. and B. 82.

³ 8 Taunt. 55.

⁸ Bruce v. Bruce, 2 Bos. and P.

⁴ *Ibid.*

230 n.

⁵ 1 Turn. and R. 244.

before the court, different judges have said,—“There is so great a contradiction in decisions respecting the boundaries of evidence, that I rather choose to give my opinion on the particular circumstances of this case, than to lay down any general rule on the subject:”¹ “My opinion goes upon the particular circumstances of this case, and I do not lay down any principle which will decide any other case:”² “Unless the court say any thing further on this case it may be taken that it is decided by the court, upon the very special circumstances thereof. . . . The court studiously abstain from deciding the general question.”³ [“It is well enough,” said Redfield, J., in *Claffin v. Wilcox*,⁴ “to decide a case upon its own peculiar circumstances, especially when it presents a strong equity, as is very often done in the English courts, much oftener, it would seem, than in this country; but, then, in Westminster Hall, such a case is never regarded as of much account in determining any other case.”]

It is very observable in many cases decided by Lord Hardwicke, that his lordship, in the course of his judgment, adverted to each material circumstance of the case; or, as it is expressed, entered into all the circumstances,⁵ or enumerated every circumstance, which existed in the case.⁶ This, for example, he did in *Nugent v. Gifford*,⁷ *Mead v. Lord Orrery*,⁸ and *Snee v. Prescott*.⁹ It is an observation of Sir W. Grant, that

¹ By Ashhurst, J., 3 Durn. and E.
34. See also *ibid.* 36.

² By Lord Eldon, 2 Russ. 347.

³ By Dallas, J., 8 Taunt. 55.

⁴ 18 Vermont, 610.

⁵ 7 Ves. 167.

⁶ 2 Durn. and E. 73.

⁷ 1 Atk. 463, 1 West's Cas. T. Hardw. 494, cited 4 Bro. C. C. 136, 7 Ves. 166, and 17 Ves. 163, 164.

⁸ 3 Atk. 235, cited 4 Bro. C. C. 136, 7 Ves. 167, and 17 Ves. 164, 165.

⁹ 1 Atk. 245, cited 2 Durn. and E. 73.

"In *Mead v. Lord Orrery*, Lord Hardwicke, instead of stating, shortly and generally, that an executor has the absolute right to dispose, as he pleases, of the testator's property, enters into all the circumstances, to show, that, in that case, the assignment ought to stand."¹ And of *Snee v. Prescott*, Buller, J., says,— "We find in *Snee and Prescott*, that Lord Hardwicke was proceeding with great caution, not establishing any general principle, but decreeing on all the circumstances of the case put together;"² "he has been so particular, that, if the printed note of it be accurate, it is not an authority for any case, which is not precisely similar to it."³ This enumeration of circumstances is represented by Buller, J., to be a common character of Lord Hardwicke's judgments. For, speaking of *Snee v. Prescott*, he says,— "Lord Hardwicke has, with his *usual* caution, enumerated every circumstance which existed in the case."⁴

Here it may be mentioned, that a further common practice of the courts is, not to deliver an opinion on a particular point, when the case does not require that opinion.⁵ The language which the bench uses is,— "I am not willing to deliver my opinion as to that point now, because the case does not require it:"⁶ "As to the right of leasing, [that is, gleaning,] it will be time enough to determine that point when it comes directly in question:"⁷ "The question whether lunacy is to be considered a dissolution [of partnership] is not before

¹ 7 Ves. 167.

² 2 Durn. and E. 73.

³ *Ibid.*

⁴ *Ibid.*

⁵ Willes, 474; 5 Durn. and E. 226;

5 Barn. and Ald. 313; 2 H. Bl. 503; 7

Taunt. 536; 1 Bro. C. C. 577; Jacob,

42; Buck, 81, 425; 1 Montagu and Mac. 134; McClell. 423; 3 Younge and J. 35, 36; 1 Mylne and K. 55.

⁶ By Holt, C. J., 7 Mod. 42; 2 Lord Raym. 784, 785.

⁷ By Yates, J., 4 Burr. 1927.

me. . . . It will be quite time enough to determine that case, [a case supposed,] when it shall arise; for as we know that no lunacy can be pronounced incurable, yet the duration of the disorder may be long or short; and the degree may admit of great variety. I would not, therefore, lay down any general rule by anticipation, speculating upon such circumstances."¹

Moreover, when several questions, or points, are made for the consideration of the court,² as where they are reserved for the opinion of the court,³ and a decision of one only of the questions, or on one part of the case,⁴ will be a sufficient determination in the cause, a general practice of the courts is, not to give a positive opinion on the other questions. Of this practice there is an example in, among other cases,⁵—*Tapner v. Merlott*, where the questions, or points, reserved for the opinion of the court were three; and as the third or last point would determine the question in the action, the court made their decision on the third point, "without giving any positive opinion on the first two points."⁶ A second example is, in *Evans v. Solly*, where Richards, C. B., said,—“I am freed from the discussion of many of the points made, and shall, therefore, decide only on that, which I am immediately called upon to determine, as I think a judge ought to do in every case.”⁷

¹ By Lord Eldon, 2 Ves. and B. 303.—Lord Eldon says of himself,—“I am not in the habit of giving opinions upon questions that are not before me.” Buck, 425. And see 1 Barn. and Adol. 587.

² 1 Burr. 269; 7 Durn. and E. 313; 9 Price, 542.

³ Willes, 179.

⁴ 7 Durn. and E. 311, 313; M'Clel. 423.

⁵ *Rex v. Marsden*, 3 Burr. 1812; *Westerdell v. Dale*, 7 Durn. and E. 306; *The King v. Lambe*, M'Clel. 423; *Earl of Chesterfield v. Janssen*, 1 Atk. 342, 351; *Vanderzee v. Aclom*, 4 Ves. 786; *Seton v. Slade*, 7 Ves. 272, 275, 279.

⁶ Willes, 177.

⁷ 9 Price, 541, 542.

And it is deserving of particular notice, that, when an event connected with a case is contingent, as a person's attainment of the age of twenty-one years, or his death without issue, and a question depends on that event, the court very commonly declines now to decide it;¹ saying, it shall reserve it,² or the question, "must be reserved till after the happening of the contingency."³

In a cause, where two points, or questions, were made, Lord Mansfield did not choose (it not being at all necessary) to declare any opinion upon the second question, because a third person, not then before the court, might be affected by it.⁴

And when a decision can be made on the merits of a case, the court sometimes waves to determine a question on the form of the suit, and confines its decision to the merits only.⁵ On a particular question in a case at law, the court said,—“We might relieve ourselves from the difficulty of deciding this question, by saying that the technical objections taken to the pleas by the demurrer are sufficient to entitle the plaintiff to judgment. But we think it more proper for us to pronounce our judgment on the principal question raised by these pleadings.”⁶

When several questions are made for the consideration of the court, and a decision of one only of the questions, or on one part of the case, will be a sufficient determination in the cause, it is, although a general, not a universal practice, to decline giving a

¹ *Gibson v. Lord Montfort*, 1 Ves. Sen. 485, 490, 492; *Haughton v. Harrison*, 2 Atk. 329; *Butler v. Freeman*, 3 Atk. 58; *Stackpole v. Beaumont*, 3 Ves. 95; *Brown v. Higgs*, 4 Ves. 718, 719; 5 Ves. 495, 508.

² 1 Ves. Sen. 490.

³ 1 Ves. Sen. 492.

⁴ *Hope v. Taylor*, 1 Burr. 272.

⁵ *Perry v. Phelps*, 17 Ves. 173, 183, 184.

⁶ *De Crespigny v. Wellesley*, 5 Bing. 401.

positive opinion on the other question. For in *Good v. Elliot*, a case that was agreed on two grounds, one of which was the common law, the other a particular statute, Buller, J., without necessity, expressed his opinion on both points, saying,—“The opinion which I hold on the first point would very well excuse me from discussing the question made on the statute; but as that point has been agitated before, and, perhaps, may be so again, I will deliver my sentiments upon both the questions.”¹

And when a court declines to decide a particular question, or point, it often, nevertheless, makes some observation on, or relative to, it, for the purpose of preventing some kind of misapprehension in future.² This was done in *Westerdell v. Dale*, where Lord Kenyon said,—“Other points have been discussed in this case, but it is not necessary to go into them at large, or to give any decisive opinion upon them now. But as some cases have been referred to on these points, I think it proper to observe, that, whenever it becomes necessary to decide those questions, those cases may, perhaps, deserve further consideration. . . . It is not necessary to decide these points in this case, and, therefore, I avoid giving any positive opinion upon them; but as several cases have been cited, I have thought it right to throw out these doubts, lest, whenever the question should arise again, it may be supposed that I have acquiesced in these determinations.”³ Also, in *Lickbarrow v. Mason*, Buller, J., stated,—“Before I consider the effect of the several authorities which have been cited, I will take

¹ 3 Durn. and E. 697.

³ 7 Durn. and E. 312, 313.

² *Earl of Chesterfield v. Janssen*, 1 Atk. 342, 351.

notice of one circumstance in this case, which is peculiar to it; not for the purpose of founding my judgment upon it, but because I would not have it supposed, in any future case, that it passed unnoticed, or that it may not hereafter have any effect which it ought to have.”¹ And in *Perry v. Phelps*, Lord Eldon thus concluded his judgment,—“I am glad to be relieved from the necessity of determining the point, whether this is a bill according to the forms of the court; of which, however, I must take some notice, as of great interest to the practice of the court, and the suitors in general, and to guard against the conclusion, that I considered such a bill sufficient. . . . At present, having no doubt upon the merits, I shall guard against future mischief, by declaring in the decree, that it is not necessary to give my judgment upon the form.”² On the present subject, however, the observation appears to be just, that, when in a case no notice is taken of a particular point, it “makes nothing against it,” if “there was no occasion there to stir or insist upon that point.”³

The decision of a question, which oversteps the boundary drawn by the circumstances of the individual case, and embraces generally other circumstances of the like nature, is usually called the decision of a general question.⁴ An example, before mentioned, of a general question, and a decision of it, is *Harington v. Hoggart*.⁵ A further example seems to be *Steel v. Houghton*, where Heath, J., stated, that, on the pleadings the general question was, “whether the indigent and necessitous poor of a parish have a right to glean,

¹ 2 Durn. and E. 72.

² 17 Ves. 183, 184.

³ 2 Vent. 328.

⁴ 5 Durn. and E. 395, 396; 8

Taunt. 54, 55, 56; Ambl. 26; 12 Ves. 182; Jacob, 38.

⁵ 1 Barn. and Adol. 577.

after the crop is carried away;" and where the court decided that they have not such a right.¹

A habit of the courts is, to wave the decision of a general question, in cases where it is unnecessary to decide it.² Sometimes, however, a judge, or court, expresses an opinion on that question, without deciding it.³ [Thus, per Grover, Justice, in *Williams v. Shelly*:⁴ "Although the question is not involved in the present case, I will remark," &c.]

The necessary effect of the practice of the courts, to confine a decision to the particular circumstances of the individual case, is, that the courts, step by step, approach to the establishment of a general proposition.⁵ The advances to this proposition consist of the decisions on the limited questions, that from time to time occur;⁶ and consequently the speed with which it is approached, and the time it takes to attain it, necessarily depend on the nature of the subject, of which those questions are a part. Those questions may be few or many; and the times of their occurrence are certainly irregular. The origin of several particular doctrines can with much certainty be named;⁷ and although in many subjects, in which a general proposition has been attained, it is probably impossible to name the steps by which it has been approached, yet clearly it is, in many instances, not difficult to trace

¹ 1 H. Bl. 51.

² *Hyde v. The Trent and M. Navig. Co.*, 5 Durn. and E. 389; *Earl of Radnor v. Shafto*, 11 Ves. 458; *West v. Berney*, 1 Russ. and M. 437; *Marnell v. Blake*, 4 Dow, 248; *Lord Kensington v. Phillips*, 5 Dow, 61.—Ambl. ed. Blunt, Append. 800, 3 Ves. 317; Jacob, 38.

³ *Hyde v. The Trent and M. Navig.*

Co., above; *Farr v. Pearce*, 3 Madd. 78.—Cas. T. Talb. 242.

⁴ 37 N. Y. 378.

⁵ 2 Durn. and E. 73; 1 Ves. Sen. 42; 5 Ves. 562; 3 Meriv. 146; 3 Swanst. 544, 617.

⁶ 1 Taunt. 366, 462; 1 Atk. 343; 1 Meriv. 32; 3 Swanst. 544, 617.

⁷ 3 Ves. 69; 13 Ves. 76, 77; 19 Ves. 663.

with considerable accuracy the progress, which a particular subject has made towards, or up to, the establishment of a general proposition.¹

Particular subjects, of which the origin may be named, are—the jurisdiction of the Court of Chancery to enforce the specific performance of agreements:² the principle of compensation, in certain cases where that performance is enforced:³ election under a will.⁴

The progress, which a particular subject has made towards, or up to, the decision of a general question, is distinctly observable in the following subjects:⁵ the admission of secondary evidence, when an attesting witness cannot be produced:⁶ the practice of the Court of Chancery to direct a sale on the words, rents, and profits in a will:⁷ compensation in certain cases, where the Court of Chancery enforces a specific performance of an agreement:⁸ the practice, in a suit where the Court of Chancery takes on itself the administration of assets, not to permit a creditor to proceed at law.⁹

This gradual extension of a doctrine is, in two of the instances above mentioned, thus clearly pointed out by the bench: “It is true, that, where there is no direction for a sale, the court [Chancery] has gone by several gradations. When any particular time is mentioned, within which the estate would not afford the charge, the court directed a sale; and then went further, till a sale was directed on the words, rents, and profits alone, when there was nothing to exclude

¹ 1 Taunt. 366; 1 Ves. Sen. 42; 1 Atk. 343; 1 Meriv. 32; 3 Swanst. 544, 617.

² 13 Ves. 76.

³ 13 Ves. 77; 1 Meriv. 32.

⁴ 19 Ves. 663.

⁵ See also 1 Atk. 343, and 3 Swanst. 617.

⁶ 1 Taunt. 366, 462.

⁷ 1 Ves. Sen. 42.

⁸ 1 Meriv. 32. See 3 Meriv. 146.

⁹ 3 Swanst. 544.

or express a sale.”¹ “It is fully settled, though not from a very ancient time, that if this court [Chancery] once takes on itself the administration of the assets of a testator or intestate, a creditor seeking, and not having yet obtained satisfaction at law shall not be suffered to proceed there; it being impossible, while the decree is considered as a proceeding for the benefit of all the creditors, to permit some of them to proceed elsewhere. That doctrine has been much enlarged, even in my time, for it was first determined by Lord Thurlow, that such relief might be obtained, not only by a creditor, but by a residuary legatee. It is now a universal rule, that after a decree for the administration of assets, those, who make a demand which they have yet to recover against those assets, must come in under that decree.”²

¹ By Lord Hardwicke, 1 Ves. Sen. 42.

² By Lord Eldon, 3 Swanst. 544.

CHAPTER XVII.

OF DECIDING NEW CASES.

NOTWITHSTANDING the accumulated cases of several centuries, and, of a large number of which, the circumstances and decision are published in the reports, or exist in manuscript notes, it very frequently happens that there comes before the courts a case, to which may be affixed the general appellation of new case,¹ and of which the court or judge sometimes speaks in the following terms: "This is a new case to which there is no parallel in the books:"² "Upon this question, no authorities have been cited either on the one side or the other:"³ "No case similar to this was cited or has been found:"⁴ "This is entirely a new case, and I do not remember any like it, that hath ever yet come in question; none have been cited, and I believe there are none:"⁵ "This case is new in specie:"⁶ "The circumstances of this case are very singular, and the case is new in its kind:"⁷ "This is certainly an action *primæ impressionis*, and is an experiment, which, it is not suggested, has been attempted before:"⁸ "I cannot find from any of my learned brethren in any court, who have judicially given any opinion, nor from any industry displayed at

¹ Ambl. 198; 1 Atk. 276; 10 Ves.
81.

² 1 Lord Raym. 692.

³ 2 Bos. and P. New Rep. 226.

⁴ 6 Barn. and Cr. 117.

⁵ 1 Atk. 276.

⁶ 10 Ves. 620.

⁷ 11 Ves. 395.

⁸ 4 Taunt. 3.

the bar, nor from my own laborious reading and research upon this subject, that in any court in England has such a case in specie ever been decided.”¹

Where there is a great probability that a like case has before occurred, a report, or other account, of such a case is often to be met with.² A court has shown its surprise at this circumstance, by saying of a particular point—“This is a question that must so frequently have happened, that it is extraordinary to find no determination directly in point:”³ “Strange it is, that it hath not been hitherto brought to certainty, being a case that must needs often happen.”⁴ In a case reported by Levinz, are mentioned certain authorities cited on the particular question; “none of which,” says the reporter, “came up directly to this, nor is any authority to be found in the books direct in the case, which the court admired, being a case which often happened.”⁵

A point that happens very often, may have never been judicially determined, because it is so common as never to be questioned.⁶ The circumstance that “the very point” has not been made the subject of decision, may arise from its having never been questioned.⁷ “A point may be so clear that it was never doubted.”⁸ In a late case involving a new question, Park, J., observed: “It is admitted by every judge and by every counsel that has spoken upon this subject, that there is a total silence of our law books, during the whole period of our ascertained law of

¹ 8 Bing. 537. See also *ibid*, 542.

² 3 Bos. and P. 21; 2 Bos. and P. New Rep. 226; 6 Durn. and E. 386; 8 Bing. 528, 542; 2 P. W. 279; 12 Ves. 134.

³ Barnard. Ch. Rep. 80.

⁴ Hob. 56.

⁵ 3 Lev. 267.

⁶ 1 Stra. 72.

⁷ 3 Ves. 12, 13; 6 Durn. and E. 604.

⁸ 7 Durn. and E. 743.

England, upon this precise point, although circumstances similar to the present must have existed many times; and this to me is a strong convincing proof that, till these days of novelty, no such idea was ever entertained upon this question, and I verily believe that no man now living ever before heard of such a claim being advanced."¹ Because a case is "so plain a case," it may be difficult to find any decision on the subject.²

The cases referred to in the margin³ are some of a great number of reported new cases.

To new cases is open a great variety of principles on which to decide them.⁴ These it is the duty of the courts fitly to apply to the circumstances of each case.⁵ And those, perhaps, most generally applicable are "reason and justice."⁶ In a case where the question was, whether a particular contract was against law, and void upon the face of it, Lord Mansfield thus spoke of the grounds on which it was to be decided: "It is admitted that the contract is against no positive law; it is admitted, too, that there is no case to be found which says it is illegal; but it is argued, and

¹ *Mirehouse v. Rennell*, 8 Bing. 542, 1 Moore and S. 683.

² 1 Ball and B. 296.

³ *Ferrer v. Beale*, 1 Lord Raym. 692; *Waters v. Ogden*, Doug. 435, ed. 1783, and 452, 4th ed.; *Davies v. Powell*, Willes, 46; *Larkins v. Larkins*, 3 Bos. and P. 16; *Newman v. Ander-ton*, 2 Bos. and P. New Rep. 224; *Doe v. Smyth*, 6 Barn. and Cr. 112; *The King v. Merchant Tailors' Comp.* 2 Barn. and Adol. 129; *Ex parte Gar-rett*, 3 Barn. and Adol. 252; *Mirehouse v. Rennell*, 8 Bing. 490, 1 Moore and S. 683; *Jennings v. Looks*, 2 P. W.

279; *Papillon v. Voice*, *ibid.* 477; *Moore v. Moore*, 1 Atk. 272; *White v. Evans*, 4 Ves. 21, cited 10 Ves. 81; *Kennell v. Abbott*, 4 Ves. 808, 809; *Williams v. Jones*, 10 Ves. 77; *Broome v. Monck*, *ibid.* 620; *James v. Dean*, 11 Ves. 395; *Rose v. Cunynghame*, 12 Ves. 36, 37; *Wilks v. Davis*, 3 Meriv. 509; *Tyndale v. Warre*, Jacob, 217.

⁴ Cowp. 39; 1 Durn. and E. 502; 3 Barn. and Ald. 245; 2 Barn. and Cr. 471; 3 Bing. 265; 8 Bing. 515, 516.

⁵ 8 Bing. 515, 516.

⁶ Willes, 473, 662; 3 Bing. 266; 2 Lord Raym. 957.

rightly, that notwithstanding it is not prohibited by any positive law, nor adjudged illegal by any precedents, yet it may be decided to be so upon principles; and the law of England would be a strange science indeed if it were decided upon precedents only. Precedents serve to illustrate principles, and to give them a fixed certainty. But the law of England, which is exclusive of positive law enacted by statute, depends upon principles; and these principles run through all the cases, according as the particular circumstances of each have been found to fall within the one or other of them.”¹ In a case on the title to present to a rectory, Best, C. J., said: “Great industry has been bestowed on the subject both by the bench and bar; but neither the judgment of any court, nor the opinion of any writer to guide us in making our decision, has been found. I have also inquired whether any instances of presentation, made under circumstances like those of the present case, are to be found in the registries of the bishop, but without success. As neither the records of Westminster Hall, nor of the Church, furnish any rule or practice to assist me in coming to a decision, I endeavored to find other cases from which I could safely reason by analogy to that now to be decided.”² In the same case, when, on error before the House of Lords, Parke, J., observed on the question, which the House had referred to the judges: “The precise facts stated by your lordships have never, as far as we can learn, been adjudicated upon in any court; nor is there to be found any opinion upon them of any of our judges, or of those ancient text writers to whom we look up as author-

¹ Cowp. 39.

² *Rennell v. Bishop of Lincoln*, 3 Bing. 265, 11 Moore, 139.

ities. The case, therefore, is in some sense new, as many others are which continually occur; but we have no right to consider it, because it is new, as one for which the law has not provided at all; and because it has not yet been decided, to decide it for ourselves, according to our own judgment of what is just and expedient. Our common law system consists in applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and, for the sake of attaining uniformity, consistency, and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to me to be of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of law as a science.”¹ “Cases,” it is observed by Lord Redesdale, “cannot always be found to serve as direct authority for subsequent cases; but if a case arises, of fraud, or presumption of fraud, to which even no principle already established can be applied, a new principle must be established to meet the fraud; as the principles on which former cases have been decided, have been from time to time established, as fraud contrived new devices: for the possibility will always exist, that human ingenuity in contriving fraud will go beyond any cases which have before occurred.”²

¹ *Mirehouse v. Rennell*, 8 Bing. 515, 1 Moore and S. 683.

² 2 Sch. and Lef. 666.

Also in a suit brought in an Ecclesiastical Court to ascertain the right of the minister of a parish to preside at a vestry meeting, Sir John Nicholl made these observations:—"The case is said to be a new one, so far as regards any express law, or any judicial decision on the subject. There is no statute, no canon, no reported judgment, either expressly affirming, or expressly negating the right. It, nevertheless, may exist as a part of the common law of the land, as a part of the *lex non scripta*, which is of binding authority, as much in the ecclesiastical as in the temporal courts. Indeed, the whole canon law rests for its authority in this country upon received usage: it is not binding here, *proprio vigore*. Moreover, this court, upon many points, is governed, in the absence of express statute or canon, by the *jus tacito et illiterato hominum consensu et moribus expressum*. It is true, that generally the existence of this *jus non scriptum* is ascertained by reports of adjudged cases; but it may be proved by other means; it may be proved by public notoriety, or be deducible from principles and analogy, or be shown by legislative recognitions."¹

Reported new cases accordingly are found that have been decided on "principles:"² on "general principles:"³ on "the plainest principles of the common law, founded, as it is, where there are no authorities, upon common sense and justice:"⁴ on a particular "principle:"⁵ on a stated "general principle:"⁶ on

¹ 3 Barn. and Ald. 245 n.

² Eaton v. Jaques, Dougl. 438, ed. 1783, and 455, 4th ed.; Jones v. Randall, Cowp. 37; Lawes v. Bennett, 1 Cox, 171.

³ The King v. Rispal, 1 W. Bl. 368; Kennell v. Abbott, 4 Ves. 808.

⁴ Stockdale v. Onwhyn, 5 Barn. and Cr. 173; 7 Dowl. and Ryl. 625.

⁵ Webb v. Rorke, 2 Sch. and Lef. 666.

⁶ Pitt v. Pitt, 1 Turn. and R. 184; Dearle v. Hall and Loveridge v. Cooper, 3 Russ. 1, 60.

"reason and justice," and "the authority of some cases, which are very like this [the particular case], though they do not quite come to it:"¹ on "principle and decisions in analogous cases:"² on certain rules of construction of deeds:³ on "general practice:"⁴ on "the books of entries and the returns of writs:"⁵ on "a fundamental maxim of the common law:"⁶ on the "constant maxim" of the Court of Chancery, "that he who will have equity must do equity:"⁷ convenience, the question in the case being one of practice.⁸

A case may not be new in principle, although it does not appear that the precise question in it has ever been determined, or that it has been even brought before a court.⁹

When a new case occurs, a duty is thrown on the court to weigh the matter brought before it, and to make the precedent which the preponderating side requires. Accordingly, the precedent may be affirmative; as, that the plea is good;¹⁰ or that the rent is apportionable;¹¹ or that the money paid may be recovered back;¹² or the precedent may be in the negative;¹³ as, that an equitable interest in a term of years cannot be sold under a *feri facias*;¹⁴ or

¹ *Barker v. Lomax*, Willes, 662.

² *Morris v. Clarkson*, 3 Swanst. 561.

³ *Legg v. Benion*, Willes, 44.

⁴ *Donisthorpe v. Porter*, 2 Eden, 162; Ambl. 600.

⁵ *Boothman v. Earl of Surrey*, 2 Durn. and E. 10.

⁶ *Firebrass v. Pennant*, 2 Wils. 254.

⁷ *Demandray v. Metcalf*, Prec. Ch. 419.

⁸ *Rose v. Page*, 2 Sim. 471.

⁹ *Dearle v. Hall and Loveridge v. Cooper*, 3 Russ. 57, 58.

¹⁰ *Prince v. Nicholson*, 5 Taunt. 665; 1 Marsh. 280.

¹¹ *Paget v. Gee*, Ambl. 198, and ed. Blunt append. 807; 2 Kenyon, 31.

¹² *Morris v. McCulloch*, Ambl. 432; 2 Eden, 190.

¹³ *Brouncker v. Scott*, 4 Taunt. 1; *Capel v. Buszard*, 6 Bing. 150; *Jesus College v. Bloom*, Ambl. 54; 3 Atk. 262; *Novosielski v. Wakefield*, 17 Ves. 417; *Musgrave v. Medex*, 19 Ves. 652; *Sampson v. Sampson*, 2 Ves. and B. 337.

¹⁴ *Scott v. Scholey*, 8 East, 467.

that an appointment executed by an infant, under a power over real estate, is not good;¹ or that money, which a person has a power to raise by appointment by deed or will, and which power he does not execute, is not assets for his debts;² or that an action is not maintainable by an administrator for a breach of promise of marriage made to the intestate by the defendant, in a case where the declaration does not contain any allegation of special damage.³

Against the making of a particular precedent, it is often a "good argument,"⁴ or "strong argument,"⁵ or "strong circumstance,"⁶ and sometimes a "sufficient objection,"⁷ that the demand, point, action, or proceeding is a novelty. "The novelty of the demand also is against it."⁸ Judicial expressions like to this constantly occur.⁹ Such novelty seems, however, generally speaking, to be "but an argument."¹⁰

This argument or objection in the new case is noticed by Littleton, who, with regard to a particular question on the Statute of Merton, mentions, that "it seemeth to some," that "no action can be brought upon this statute, insomuch as it was never seen or heard that any action was brought; and if any action might have been brought for this matter, it shall be intended that at some time it would have been put in use."¹¹ On this passage, Sir E. Coke observes,—

¹ *Hearle v. Greenbank*, 3 Atk. 709, 717; 1 Ves. Sen. 304. See 9 Ves. 472.

² *Holmes v. Coghill*, 7 Ves. 499; 12 Ves. 206, 216.

³ *Chamberlain v. Williamson*, 2 Maule and S. 408.

⁴ Cro. Eliz. 521; Willes, 51.

⁵ Dougl. 442, ed. 1783, and 459, 4th ed.

⁶ 1 Swanst. 89.

⁷ 4 Taunt. 3; 2 Ves. and B. 340.

⁸ 1 Jac. and W. 132.

⁹ 2 Eden, 61; 3 Durn. and E. 53; 2 Maule and S. 415; 2 Bos. and P. New Rep. 165; 4 Taunt. 3; 7 Taunt. 533; 6 Bing. 161; 8 Ves. 252.

¹⁰ Willes, 472.

¹¹ Litt. § 108, cited 1 Co. 87 b, 2 Lord Raym. 944, 957, and 6 Mod. 47, 56.

“Hereby it appeareth how safe it is to be guided by judicial precedents, the rule being good, *Periculosum existimo, quod bonorum virorum non comprobatur exemplo*. And as usage is a good interpreter of laws, so non-usage, where there is no example, is a great intendment that the law will not bear it.”¹ Chief Justice Willes assents to this opinion of the great commentator, saying,—“It was rightly said, as the rule is laid down by Lord Coke, that where a thing has never been done, it is a strong argument that it ought never to be done;” an assent, however, which the learned Chief Justice expressly qualifies by adding, “but it is but an argument.”² Littleton’s text was relied on by Powys, J., in *Ashby v. White*, where he said,—“This action is not maintainable for another reason, which, I think, is a weighty one, viz., this action is *primæ impressionis*; never the like action was brought before; and therefore as Littleton uses it to prove that no action lay on the Statute of Merton, for if it had lain, it would have sometimes been put in use: so here.” And he adds,—“So in the case of Lord Say and Seal *v. Stephens*, Cro. Car. 142, for the law is not apt to catch at actions.”³ In the same cause of *Ashby v. White*, which, it is observable, was an action on the case, Powell, J., and Holt, C. J., differed from Mr. Justice Powys; the former saying,—“As to the novelty of this action, I think it no argument against the action; for there have been actions on the case brought, that had never been brought before, but had their beginning of late years, and we must judge upon the same reason, as other cases have been determined by.”⁴ And in the same

¹ Co. Litt. 81 b.

² Willes, 471, 472.

³ 2 Lord Raym. 944; 6 Mod. 47.

⁴ 2 Lord Raym. 946; 6 Mod. 48.

case, Holt, C. J., observed on the opinion, mentioned in Littleton, that no action lay, because none had ever been brought,—“Indeed that is an argument, when it is founded upon reason, but it is none, when it is against reason.” And on the opinion in Littleton he adds,—“This saying has no great force; if it had, it would have been destructive of many new actions, which are at this day held to be good law. The case of Hunt and Dowman¹ was the first action of that nature, but it was grounded on the common reason, and the ancient justice of the law. So the case of Turner and Sterling.² Let us consider wherein the law consists, and we shall find it to be, not in particular instances and precedents, but on the reason of the law, and *ubi eadem ratio, ibi idem jus*.”³ The learned chief justice then refers to several cases,⁴ where the action was the first “of that nature, but the novelty of it was no objection to it.”⁵

The causes, so referred to by Chief Justice Holt, were actions on the case; and it is certain that an objection to a case, on account of its novelty, may frequently not be applicable to a special action on the case.⁶ In *Winsmore v. Greenbank*, which was an action on the case, Willes, C. J., in reply to an objection taken by the defendant, said,—“The first general objection is, that there is no precedent of any such action as this, and that therefore it will not lie; and the ob-

¹ Cro. Jac. 478.

² 2 Lev. 50, 1 Ventr. 206, 2 Ventr.

25.

³ 2 Lord Raym. 957; 6 Mod. 56.

⁴ *Morse v. Slue*, 1 Ventr. 190, 238; *Smith v. Crashaw*, Cro. Car. 15; *Herring v. Finch*, 2 Lev. 250; *Bodily v. Long*, 15 Car. II, C. B.

⁵ 2 Lord Raym. 957; 6 Mod. 56.

⁶ *Ashby v. White*, 2 Lord Raym. 938, 946, 957; 6 Mod. 45; cited 2 Wils. 146; *Chapman v. Pickersgill*, 2 Wils. 146; *Pasley v. Freeman*, 3 Durn. and E. 63.—4 Burr. 2345.

jection is founded on Litt. § 108, and Co. Litt. 81 b, and several other books. But this general rule is not applicable to the present case: it would be, if there had been no *special action on the case* before. A special action on the case was introduced for this reason, that the law will never suffer an injury and a damage without a remedy; but there must be *new facts* in every special action on the case.”¹

On novelty being an objection to a case, the following judicial opinions occur in some modern instances of different kinds:²—“An argument which has been made use of is, that this is a new case, and that there is no precedent of such an action. Where cases are new in their *principle*, there I admit that it is necessary to have recourse to legislative interposition in order to remedy the grievance; but where the case is only new in the *instance*, and the only question is upon the application of a principle recognized in the law to such new case, it will be just as competent to courts of justice to apply the principle to any case, which may arise two centuries hence, as it was two centuries ago; if it were not, we ought to blot out of our law books one fourth part of the cases, that are to be found in them.”³ “It may be true that a similar action in specie is not to be found in any law book; and I admit, that if the case were new in *principle*, it would be necessary to apply to the legislature, and not to a court of law; but where the case is one new in the *instance*, and the question is upon the application of a principle recognized in the law to such new case, it will be just as competent to courts of justice to apply the principle to a case which may arise two centuries hence, as it

¹ Willes, 580.

² See also Willes, 51.

³ By Ashhurst, J., *Pasley v. Freeman*, 3 Durn. and E. 63.

was two centuries ago. This is the very nature of an action on the case."¹ [In a case in *Gouldsborough*, p. 96, one of the counsel said that he had searched all the books, and "there is not one case," &c.; to which Chief Justice Anderson responded,—“What of that? Shall not we give judgment because it is not adjudged in the books before? We will give judgment according to reason; and if there be no reason in the books, I will not regard them.” And per Campbell, Lord Chancellor, in *Lynch v. Knight*,²—“Though a case is of first impression, if it shows a concurrence of loss and damage arising from the act complained of, the action will be maintainable.”]

On making a precedent, it may sometimes be the duty of the court to make it “upon great consideration;”³ and before making it, it may be its duty, in some instances, to deliberate for some time on the question, and, for that purpose, to cause the case to stand over.⁴ On a new point in the Court of Chancery, it may be the duty of the court to cause it to undergo “a solemn determination;” and, if it is a legal question, to make a case, and send it to the judges to have their determination upon it.⁵ In other instances, there may be small doubt on which side to make the precedent; as in cases where the court has said,⁶—“This is a new case, and no case has been cited. I am of opinion the plaintiff’s equity is so strong, that I will make a precedent:”⁷ “I have not the least doubt on this case; and if there is no precedent of such a de-

¹ By Park, J., 7 Taunt. 515. And see 3 Bing. 550.

² 2 Ho. of Lords Cas. 577.

³ 7 Ves. 586.

⁴ 8 East, 483; 5 Taunt. 669; 2 Maule and S. 414.

⁵ 3 Atk. 554; 1 Atk. 134; Ambl. 322, 768.

⁶ See also 1 P. W. 128; 4 Ves. 809; and 1 Ves. and B. 223, 224.

⁷ Ambl. 198, and ed. Blunt, 809; 2 Kenyon, 34.

termination as I shall make, I have no scruples to make one, and shall glory in doing it.”¹ [“Every precedent,” said Lord Chancellor Ellesmere, “must have a beginning. Why may we not make precedents as well as those who went before us.”² And by Le Blanc, J., in *Berkley v. Presgrave*,³—“Unless it be shown by authority that the action does not lie, we must presume that it does, upon the common principle of justice, that where the law gives a right, it also gives a remedy.”]

The conclusion of this chapter may be considered a fit place, in which to notice the following, among other,⁴ observations of Sir Edward Coke, on “new and subtile inventions in derogation of the common law.”⁵ “The wisdom of the judges and sages of the law have [has] always suppressed new and subtile inventions in derogation of the common law.”⁶ “In these last three sections, our author [Littleton, §§ 721, 722, 723,] hath taught us an excellent point of learning, that when any innovation or new invention starts up, to try it with the rules of the common law (as our author here hath done;) for these be true touchstones to sever the pure gold from the dross and sophistications of novelties and new inventions. And by this example you may perceive, that the rule of the old common law being soundly (as our author hath done) applied to such novelties, it doth utterly crush them and bring them to nothing; and commonly a new invention doth offend against many rules and reasons (as here it appeareth) of the common law, and the ancient judges and sages of the law have ever (as it appeareth in our

¹ Ambl. 434; 2 Eden, 193.

² 1 Burnett's Hist. of His. Times, 571; 12 Coke, 74 b; 3 Wynne's Euno-mus, 177.

³ 1 East, 229.

⁴ Co. Litt. 282 b, 379 a.

⁵ Co. Litt. 282 b.

⁶ *Ibid.*

books) suppressed innovations and novelties in the beginning, as soon as they have offered to creep up, lest the quiet of the common law might be disturbed.”¹

In a modern case, *Tolputt v. Wells*, an agreement made by the defendant, an executrix, with certain creditors of her testator, and a judgment obtained in pursuance of such agreement, could not be sustained; it being characterized by Lord Ellenborough as “a fanciful attempt to introduce a novelty in the established law relating to executors;” and Grose, J., saying, “I cannot think this agreement can be supported as pleaded. It is, in reality, a fanciful attempt at novelty; and nothing more clearly shows it than this, that there is no instance of such a form of pleading.”²

[When the liability of provisional committeemen, which was a new subject, came to be dealt with within the last quarter of a century, the judges at first all assumed that a provisional committeeman was on the footing of a partner, and it took many years of misdirected litigation before it occurred to an eminent judge to question the analogy altogether, and the House of Lords at last ultimately settled that it was a false analogy which had been at first adopted and acted upon.³

[In *Abrey v. Crux*,⁴ Willes, J., says,—“I do not see why we should not, in a novel case to which no distinct law is applicable, rather follow the justice of the case, than strive to bring the case within a principle which will defeat justice.”

[What Lord Chancellor Cottenham said in *Taylor v. Salmon*,⁵ applies, perhaps, to all courts:—“I think

¹ Co. Litt. 379 b.

² 1 Maule and S. 394.

³ Lord Westbury upon a revision

of the law, House of Lords, 12 June, 1863.

⁴ 5 Law Rep. 44 C. P.

⁵ 4 Mylne and Craig, 134.

it the duty of this court to adapt its practice and course of proceeding, as far as possible, to the existing state of society, and to apply its jurisdiction to all those new cases which, from the progress daily making in the affairs of men, must continually arise, and not from too strict an adherence to forms and rules established under very different circumstances, decline to administer justice and to enforce rights for which there is no other remedy.”]

CHAPTER XVIII.

OF ESTIMATING AUTHORITIES.¹

- Sec. I. Of the Comparative Value of Certain Authorities.
II. Of Circumstances, which may increase the Value of an Authority.
III. Of Circumstances, which may lessen the Value of an Authority.
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SECTION I.

OF THE COMPARATIVE VALUE OF CERTAIN AUTHORITIES.

[A DECISION of a court is evidence of the law, "and this evidence is stronger or weaker, according to the number and uniformity of adjudications, the unanimity or dissension of judges, the solidity of the reasons on which the decisions are founded, and the perspicuity and precision with which these reasons are expressed. The weight and authority of judicial decisions, depend also, on the character and temper of the times in which they are pronounced. An adjudication, at a moment when turbulent passions or revolutionary frenzy prevail, deserves, much less respect, than if it were made at a season propitious to impartial inquiry and calm deliberation."²]

Generally speaking, a judgment given by the House of Lords is of greater authority, than is a judgment given by a Court of Westminster Hall. Sir W. Grant, citing a case in Brown's Parliamentary Reports, observed, that, being before the House of Lords, it must

¹On estimating *dicta* expressed on the Bench, see also chapter v.

²Platt, Senator, *Yates v. Lansing*, 9 Johns. 415.

supersede the authority of every other case.¹ So, Lord Eldon, mentioning *Travis v. Oxton*,² a decision by the House of Lords, and *Bennet v. Read*,³ decided by the Court of Exchequer, says,—“The doctrine of *Travis v. Oxton*, if different from that of *Bennet v. Read*, though the latter is the more recent decision, must prevail, since it has the authority of the House of Lords.” And again, “*Bennet v. Read*, if not distinguishable, from *Travis v. Oxton*, though later, cannot prevail against it, in opposition to the authority of the House of Lords.”⁴ In *Kettle v. Townsend*, one devised a copyhold estate to his grandson, and Lord Somers decreed that equity ought to supply a surrender in his favor. But the House of Lords reversed this decree, holding that equity ought not to supply the surrender.⁵ Of this reversal many judges have expressed their disapprobation.⁶ Thus, counsel having observed that it had been decreed in the House of Lords, that they would not supply the want of a surrender in case of a devise to grandchildren, Sir John Trevor, M. R., answered, “that it was his opinion, such a devise of a copyhold, without a surrender, ought to be made good for grandchildren, as well as children; and if the same case were to come now into the House of Lords, it would be so ruled, and that he had, and would decree it so.”⁷ And it appears that the like was also declared by Lord Harcourt.⁸ Of *Kettle v. Townsend*, Lord Loughborough speaks in these terms:—“I have no difficulty in saying, I think of that determination of the House of Lords, as Lord Harcourt and other judges

¹ 7 Ves. 347.

⁵ 1 Salk. 187; Anon. 2 Freem. 197,

² 1 Anstr. 308 n, 7 Bro. P. C. ed. Toml. 49.

very probably S. C.

³ 3 Bro. C. C. 231.

⁴ 1 Anstr. 322 n.

⁷ 1 P. W. 61.

⁶ 3 Swanst. 152, 156.

⁸ *Ibid.*

have done. . . . Upon the journals of the House of Lords, it appears no one was present upon that occasion, who could know much of the matter; it was not determined by lawyers; and Lord Harcourt speaks of it certainly as not such a decision as he would follow; and one or two other judges have not treated it with much respect.”¹ In *Perry v. Whitehead*, however, where the bill prayed that the want of a surrender might be supplied in favor of grandchildren, Lord Eldon held himself to be bound by *Kettle v. Townsend*; his lordship saying, “I feel great difficulty in hearing this cause. The question with me, adopting all the sentiments of the great persons named, as far as they go, with due submission to that court, which has a right to bind me and them, is, whether I can set up my judgment against a judgment of the House of Lords. A rule of law laid down by the House of Lords cannot be reversed by the chancellor; though if there is any difference from a circumstance, that was not before the House of Lords, the cause may be decided upon that. . . . The rule of law must remain till altered by the House of Lords.”²

The authority of a decision by the House of Lords is further shown by the circumstance, that, in disclaiming a power to alter a particular doctrine, a judge commonly says, if the doctrine is to be altered, it must be altered by the House of Lords;³ and is also shown by the circumstance, that a judge frequently expresses a wish that a case be decided in the House of Lords,⁴ and often puts it in a course to go there.⁵

The following opinions occur on the binding force

¹ 5 Ves. 565.

² 6 Ves. 544, 547, 548.

³ 6 Ves. 548; 1 Turn. and R. 347.

⁴ 1 Eden, 414; 1 Russ. and M. 276, 483.

⁵ 11 Ves. 667; 1 Turn. and R. 25; 1 Younge and J, 249; 12 Price, 6.

of the judgments of the House of Lords.—Best, C. J., delivering in that House his opinion on certain questions submitted to the judges, observes,—“Although the Courts below will not impugn your lordships’ judgments in cases *ad idem*, yet they do not hold that they are bound by them beyond the point actually decided. The courts below truly say, we cannot know that the House of Lords would carry this determination further than they have carried it.”¹ And Lord Eldon, remarking in the House of Lords on an observation that had been made, says,—“As to an observation made with respect to the case of the feoffees of Heriot’s Hospital, that the judgment of this House in that case was one to be obeyed, not to be followed, I must take the liberty to say, that this would be a course which, if pursued, would call for some attention. For, although every court may say, that, if a case varies in facts and circumstances, it is at liberty to proceed upon these different circumstances, I do not recollect that it ever fell from a judge in this country, that he would obey the judgment of this House in the particular case, but not follow it in others. That is not a doctrine to which we are accustomed.”²

A judgment of a court of error, which has reversed that of the court below, is, as authority, superior to the latter. Parke, J., delivering his judgment in *Garland v. Carlisle*, a case in the Exchequer Chamber, observes,—“The present case is precisely similar, as to the principal question, to that of *Balme v. Hutton*,³ recently so much discussed and considered in the Courts of Exchequer and Exchequer Chamber; in

¹ 3 Bing. 569.

² 6 Dow, 112.

³ 2 Crompt. and J. 19; 1 Crompt. and M. 262.

which all the authorities were reviewed, and the decision of the former court was reversed by the all but unanimous opinion of the latter; and by the court of error this action was held to be maintainable. I must own that it appears to me, that, even if a different opinion might have been maintained before that case, we must conform to that decision, if we are to treat the present case in the same way that others have hitherto been treated. In our system of judicature, we are bound by precedent, and the authority of previous cases, unless they are plainly and manifestly founded upon erroneous principles; and that for the wise purpose of securing a reasonable degree of certainty in our judicial proceedings. We have here a direct authority, in addition to a great number which existed before, upon the very question; a solemn judgment of a court of error, which has reversed that of the courts below, and, whatever respect we may feel for the judges of that court, has thereby, for the present at least, deprived that judgment of its authority as a guide in similar cases. We are not in the situation of being obliged to weigh the conflicting decisions of two different yet equal courts against each other, and of contrasting the arguments in favor of each; but we are bound to consider the judgment of one court as annulled by the superior authority of the court of error, and to treat it as being wrong in point of law, until the highest tribunal in the country shall have pronounced a different opinion, or unless the judgment of reversal should appear, beyond all reasonable doubt, to have proceeded on wrong principles, which it is quite impossible to predicate in the present instance. If we do not adopt this course, no decision, except that of the House of Lords, can be safely relied upon as an authority by practitioners in advising their

clients, or judges in pronouncing an opinion upon questions of law. Upon this ground, though I had entertained never so strong an opinion in favor of the decision of the Court of Exchequer, I should have felt bound to defer to the judgment of a superior court, and to act in conformity to it in other cases; but, if called upon to advise the House of Lords on a writ of error, I should have undoubtedly considered myself at liberty to express the opinion which I entertained, without giving the same weight to the particular judgment under review.”¹

A judgment given by a court of Westminster Hall, and sitting in bank, exceeds in authority a judicial opinion of, or point ruled by, a judge sitting in a court of *nisi prius*.² Thus, Lord Kenyon, speaking of a decision in bank, and two subsequent cases at *nisi prius*, and applying them to the point before him, says,—“This point came under the consideration of the court in the case reported in Wilson, and I think that that case was properly decided. Then it was urged, that two cases have been since determined at *nisi prius* the other way; but they were only decisions at *nisi prius*, where, perhaps, the subject was not so well considered, and they cannot outweigh the authority of the case in Wilson.”³

Between a judge's different opinions given at *nisi prius* and in bank, the one delivered in bank is entitled to preference. Buller, J., speaking of certain determinations by Lord Mansfield, observes,—“I hope to show that there has been no inconsistency in any of his determinations; but, if there had, if I could not reconcile

¹ 2 Crompt. and M. 64.

² 2 Durn. and E. 74; 7 Durn. and E. 85.

³ 7 Durn. and E. 334.

an opinion which he had delivered at *nisi prius* with his judgment in this court [King's Bench in bank,] I should not hesitate to adopt the latter in preference to the former."¹

The value set on *nisi prius* opinions is, generally speaking, small. This fact, and some reasons for it, are to be gathered from the terms in which the judges very commonly speak of those opinions. These terms, amongst others,² are:—"The case in Lord Raymond, though before an eminent judge, was only a *nisi prius* decision. . . . At most, it is only an opinion delivered at *nisi prius*."³ The case tried before Mr. Justice Wilson "was only a determination at *nisi prius*; and in the hurry of business of that kind the most able judges are liable to err:"⁴ Gibbs, J., assigning reasons for a judgment, in which he differed from an opinion of Mansfield, C. J., says,—“I have stated the reasons more particularly, because my lord was of a different opinion at *nisi prius*; but a judge cannot always at *nisi prius* entirely understand the cause:"⁵ Mansfield, C. J., referring to a *nisi prius* decision of Lord Ellenborough, observes,—“When I first saw that case in Campbell, I was in the same state as Mr. Justice Gibbs, and doubted a great deal whether it could be law. . . . It is utterly impossible for any judge, whatever his learning and abilities may be, to decide at once rightly upon every point, which comes before him at *nisi prius*; and whoever looks through Campbell's Reports will be greatly surprised to see, among

¹ 2 Durn. and E. 73, 74.

³ By Lord Kenyon, 3 Durn. and E. 261, 262.

² 1 H. Bl. 53, 63; 2 Durn. and E. 120, 123; 6 Durn. and E. 409, 423; 7 Durn. and E. 62, 85, 397; 5 Barn. and Cr. 575, 577; 1 McClell. and Y. 190, 405; 2 Crompt. and M. 42, 66.

⁴ By Lord Kenyon, 5 Durn. and E. 409.

⁵ By Gibbs, J., 4 Taunt. 810.

such an immense number of questions, many of them of the most important kind, which came before that noble and learned judge—not that there are mistakes, but that he is in by far the most of the causes so wonderfully right, beyond the proportion of any other judges.”¹ Abbott, C. J., speaking of another case, says,—“Notwithstanding the great respect which I feel for every decision by Lord Ellenborough, I cannot forbear observing, that the case of *B. v. P.* was only a *nisi prius* decision, and the termination of the suit was such, (a juror being withdrawn,) as to give no opportunity of revising the opinion there expressed.”² Lord Eldon, adverting to a point, considered to be bound by a decision of Lord Kenyon, at *nisi prius*, observes,—“No one will suspect me of not giving all due weight to any opinion of Lord Kenyon; but I must know a great deal more than I do, before that determination at *nisi prius* will decide my judgment upon such a point.”³ Of another case, Best, J., thus speaks,—“The case of *P. v. G.*, decided by Lord Kenyon, has been referred to. No man can entertain a higher respect for the memory of that noble and learned judge than I do; but *nisi prius* decisions, coming even from him, unless they have been acted upon by succeeding judges sitting in bank, are entitled to very little consideration.”⁴ And Best, C. J., adverting to a case at Lancaster assizes, says,—“As to the *nisi prius* case at Lancaster, I wish such cases were never cited. It is not right to repeat opinions hastily formed and delivered in the hurry of trial, and the practice of referring to them has occasioned all the confusion that the enemies of our law object to.”⁵

¹ 5 Taunt. 195.

² 15 Ves. 262.

³ By Abbott, C. J., 3 Barn. and Cr.

⁴ 3 Barn. and Ald. 341.

143.

⁵ 2 Bing. 90.

The small weight of a *nisi prius* decision is further shown by an instance of an expressed satisfaction, that a particular point was brought before a court in bank. Lord Mansfield, speaking of such a point, says,—“I have long wished for an opportunity to have this point considered by the court; because I would not take upon myself, at *nisi prius*, to change what has commonly been the practice.”¹

An interlocutory order of the Court of Chancery, as, an injunction to stop proceedings at law, is of less authority than is a final judgment of the court.² In *Drew v. Harman*, on counsel inferring an opinion of the court, from an injunction which they had granted, Richards, C. B., interposed by saying,—“I wish it to be understood, that the circumstance of an injunction having been granted is not to be considered (as I observe it frequently is in argument) as any thing like an indication of an opinion of the court on the merits of a cause. An injunction is but an interlocutory order, made for the sake of security, and very often the court, as will most probably be the case here, ultimately decides exactly the other way.”³

The comparative value of a decision on a petition in bankruptcy is thus stated by Lord Thurlow.—Speaking of the subject of such a petition he says,—“If indeed the subject was of an extent to bear being put into a different mode of investigation, I should have no objection to doing so; but as it is, it will remain only a decision in bankruptcy; and whenever a case shall arise, that may bring the question fully before the court in another shape, admitting of a more

¹ 2 Burr. 1081; 1 W. Bl. 261, 263.

³ 5 Price, 322.

² 5 Price, 322; Daniell, 150; 1 Sim. and St. 214.

solemn determination, what I now determine will only have the weight belonging to it, namely, a decision on a petition in bankruptcy.”¹

Lord Manners having, in the Court of Chancery in Ireland, stated a case adjudged by Lord Redesdale, against whose opinion it was said,—“That this was an opinion on a motion for an injunction, and not a deliberate judgment on a hearing on pleadings and proofs,” remarked on these circumstances,—“I do not think that that objection can have much weight. Where all the facts appear upon the bill and answer, and there is nothing in dispute between the parties but the law of the court, it is very common both in this court and in England to decide the question upon motion; there are many instances in the reports of Lord Redesdale’s time, and in the cotemporary reports; it is a great saving of expense to the parties, and the judgment of the court is equally entitled to weight and authority.”²

[“As a general rule, a decision pronounced by an inferior court does not bind a superior one; still there are circumstances in which, by reason of long usage, or the character of the inferior judges, or something of the sort, such decisions or a course of decisions will be received by the higher tribunal with great respect. In England this apparent exception becomes almost the rule; or, rather, a system of co-ordinate superior courts exists, and then the decisions of one are read in another, though perhaps not in the strictest sense as authority; and, even in the House of Lords, very great weight is given to the adjudications of the working superior courts, whose judgments it has still jurisdiction to revise. But such is hardly authority in the

¹ 2 Cox, 70.

² 2 Ball and B. 286.

very narrowest meaning of the word.”¹ An instance of the House of Lords yielding its opinion and resting its judgment upon a decision of an inferior court, viz.: the Exchequer Chamber, is afforded by the case of *Lister v. Perryman*,² and it suggests the question: Why, while reviewing a decision of the Exchequer Chamber, the House of Lords felt itself so fettered by a decision of the Exchequer Chamber as to cause them to reverse a decision of that court, not because they were dissatisfied with it, but because they considered it in conflict with a former decision of that same court (Exchequer Chamber)? While it is the sole province of appellate courts to supervise decisions of the court below, they, nevertheless, in support of their judgments, cite the decisions of the courts below. In *Belmont v. Coleman*,³ Bacon, J., refers, in his opinion, to a report of a decision, made by himself at a special term in the court below, but he adds, “which I do not of course cite as an authority in this court.”

[As to the importance attached in the American courts to adjudications in the English tribunals, it has been truly said, that such decisions are only “quasi authority.”⁴ “As the colonies formed one country with England and the other parts of the kingdom and its dependencies, the English decisions pronounced afterward, down to the Revolution, are deemed with us somewhat more weighty than those which have been rendered since.”⁵ “When an English statute which has received a fixed and known construction is adopted in this State (Vermont), it must receive the

¹ Bishop's First Book of the Law, § 95.

² 5 Law Rep. 374, add. Cas.

³ 21 N. Y. 101.

⁴ Bishop's First Book of the Law, § 448.

⁵ Bishop's First Book of the Law, § 96, citing *Koontz v. Nabb*, 16 Md. 549, 555.

same construction here.”¹ “It is scarcely necessary to say,” remarks Denio, J., in *Andrews v. Durant*,² “that the English cases since the Revolution are not regarded as authority in our courts. Upon disputed doctrines of the common law they are entitled to respectful consideration ; but where the question relates to the construction or effect of a written contract, they have no greater weight than may be due to the reasons given in their support.” “We think,” says Justice Redfield, in *Dunstin v. Cowdry*,³ “the decisions of the English courts, as to the common law, or the construction of ancient statutes, are to be regarded of paramount authority, and especially should we so regard them when found to be in accordance with the soundest reason and the wisest policy.” “It is a rule universally adopted and practised upon in all our State and National tribunals when interpreting words and expressions in our statutes and charters which have been previously used and judicially expounded in the law of England, to take them in the sense then familiarly known and understood, and this sense is best ascertained by judicial decisions and the usage of celebrated elementary writers.”⁴ These foreign cases, adjudged by learned men in countries where the same general system of law prevails as here, are high evidences of what the law is. When cited in our courts, they are not only listened to with respect, but their conclusions are followed, unless the judge sees some good reason for dissenting.⁵ * * * Perhaps in some States the respect given to these foreign adjudications is not quite so great as this statement would

¹ *Adams v. Field*, 21 Vermont, 256.

² 11 N. Y. 44.

³ 4 Mon. Law Rep. 193 N. S.

⁴ *Curtis, J.*, 4 Cranch, 471.

⁵ *Cumberland v. Codrington*, 3 Johns. Ch. 229, 262; *A. v. B.*, R. M. Charlton's Rep. 228.

seem to imply,¹ and indeed there can be no very exact rule upon the subject. The legislature of Pennsylvania * * passed a statute prohibiting the citation in the tribunals [of that State] of English cases bearing a date later than July 4, 1776.² "Yet," said Tilghman, Ch. J., "the legislature was never so unwise or so illiberal as to wish to restrain the judges from deriving useful information from the opinions of learned foreigners of all nations."³ A provision, prohibiting the citation of English cases, "exists also in one or two other States, but it is not likely to be further extended."⁴

[Ordinarily a decision in a court of the same State is preferred to a decision in a foreign tribunal, but this is not universally the case. Thus in *Sheldon v. Wright*,⁵ the Court of Appeals followed a case in a foreign tribunal⁶ in preference to a case in the Supreme Court of New York,⁷ because the former appeared to be better considered and to rest on sounder reasons. The decisions of the Supreme Court of the United States, although entitled to great consideration, are not binding on the State courts; thus, per Cady, J., in *Marfield v. Goodhue*,⁸ "The decisions of that court (Supreme Court of the United States) are entitled to great consideration; and in all cases which can be reviewed in that court, its judgments must be regarded as binding on all other judicial tribunals in our country, but in other cases the opinions of that court are

¹ *Marks v. Morris*, 4 Hen. and M. 463.

² *Du Ponceau's Jurisd.* 102.

³ *Lewer v. Commonwealth*, 15 S. and R. 93, 96.

⁴ *Bishop's First Book of the Law*, § 450.

⁵ 5 N. Y. 517.

⁶ *Bachelor v. Bachelor*, 1 Mass. 255.

⁷ *Anon.* 1 Wend. 90.

⁸ 3 N. Y. 71.

entitled to the same respect, and no other, that is due to the opinions of any other court composed of judges of equal learning and ability." And in *Stalker v. McDonald*,¹ the Court of Errors in New York refused to follow the decision of the United States Supreme Court, in *Swift v. Tyson*.² Again, in *Lyon v. Mitchell*,³ the Court of Appeals in New York disregarded the decision of the Supreme Court of the United States, in *Norris v. Tool Co.*⁴ In *Davis v. Packard*,⁵ Davis, a foreign consul, was sued in the Supreme Court of New York; he did not plead his office in abatement or in bar, but judgment having passed against him, he sued out a writ of error to the then Court of Errors. That court affirmed the judgment of the Supreme Court. Davis then appealed to the Supreme Court of the United States, and that court reversed the judgment. Upon the record being remitted to the Court of Errors, that court entered a reversal of their judgment of affirmance, but dismissed the writ of error, thus altogether depriving Davis of any benefit from the judgment of the United States Supreme Court. A somewhat similar course was pursued by the Court of Advocates in Scotland to avoid the effect of a judgment of the House of Lords.⁶

[The decisions of a State court are authoritative in the federal courts when they construe a local law; ⁷ as,

¹ 6 Hill, 93.

² 16 Peters, 1.

³ 36 N. Y. 243.

⁴ 2 Wallace, 45.

⁵ 6 Wend. 327; 10 Wend. 50. As to the power of the Supreme Court of the U. S. to enforce its judgment. See *Martin v. Hunter's Lessee*, 1 Wheat. 305, 353.

⁶ See Macqueen's Practice of the House of Lords, 443.

⁷ *Bank of Hamilton v. Dudley*, 2 Pet. 492; *Gelpcke v. Dubuque*, 1 Wall. 175; *Barker v. Henry*, 1 Pa. 559; *Nesmith v. Sheldon*, 4 McLean, 375; 7 How. 812; *Springer v. Foster*, 2 St. 383; *Heydock v. Stanhope*, 1 Curt. 471; *Bank of the United States v. Longworth*, 1 McL. 35; *Dundas v. Bowler*, 3 McL. 397; *Boyle v. Arledge*, Hemp. 620; *Prentice v. Zane*, 11 Law Rep. 204.

for example, a tax law,¹ a statute of limitations,² a statute concerning land;³ and a decision of a State court that a State statute is not in conflict with the State constitution is binding on the federal court,⁴ so is a decision which construes a State constitution.⁵ The construction of instruments of grant from and to the Crown of England is not a question of local law as to which the decisions of the State courts are binding on these of the Union.⁶ The United States Courts follow the decisions of the State courts concerning executions.⁷ And where the construction of a State law has been settled by a series of decisions of the highest State court, differently from a former decision of the Supreme Court of the United States, the latter construction will be adopted by the federal courts.⁸ If a Circuit Court of the United States has adopted the construction of a local statute placed upon it by the State court, its judgment will not be reversed, because the State court subsequently overruled its former decision.⁹ The overruling of a decision in a State court is not allowed to retroact upon the judgments of the

¹ *Paine v. Wright*, 6 McLean, 395.

² *Leffingwell v. Warren*, 2 Bl. 599; *Harpending v. Dutch Church*, 16 Pet. 455.

³ *Polk v. Wendal*, 2 Overt. 118; *Thatcher v. Powell*, 6 Wh. 119; *McDowell v. Peyton*, 10 Wh. 454; *Shelley v. Guy*, 11 Wh. 367; *Bell v. Morrison*, 1 Pet. 352; *D'Wolf v. Rabaud*, 1 Pet. 476; s. c. 1 Pa. 580; *Davis v. Mason*, 1 Pet. 503; *Waring v. Jackson*, 1 Pet. 570; *Gardner v. Collins*, 2 Pet. 58; *Beach v. Viles*, 2 Pet. 675; *McCluny v. Silliman*, 3 Pet. 270; *Ross v. McLung*, 6 Pet. 283; *McCutchen v. Marshall*, 8 Pet. 220; *Smith v. Kern-*

chen, 74, 198; *Nesmith v. Sheldon*, 7 H. 812; s. c. 4 McL. 375; *Leffingwell v. Warren*, 2 Bl. 599; *Thompson v. Phillips*, Bald. 246; *Coats v. Muse*, 1 Brock. 539; *Griffing v. Gibb*, 1 McAl. 212; *Nichols v. Levy*, 5 Wall. 433, and numerous other cases.

⁴ *Gut v. Minnesota*, 9 Wall. 35.

⁵ *Randall v. Brigham*, 7 Wall. 523.

⁶ *Martin v. Waddell*, 16 Pet. 367.

⁷ *U. S. v. Morrison*, 4 Pet. 124.

⁸ *Green v. Neal*, 6 Pet. 291, s. c. 1 McL. 18; *S. P. Suydam v. Williamson*, 24 H. 427; *Leffingwell v. Warren*, 2 Bl. 599.

⁹ *Morgan v. Curtenius*, 20 How. 1.

federal courts,¹ or affect past transactions;² thus, a contract having been entered into under a settled construction of a State constitution, will be protected in the federal courts, notwithstanding a conflicting more recent decision of the highest State court;³ and so where bonds issued to *bonâ fide* holders for value are valid by the judicial decisions of a State, when issued, subsequent decisions cannot destroy their validity.⁴ The State laws which prescribe rules of evidence in civil cases are binding as rules of decision in the federal courts.⁵

[Where the decisions of the State courts, on a question affecting the title to real estate, are conflicting, the federal courts are bound to take the law as settled by the last decision, whether right or wrong, on principle, and though decided by a bare majority of the judges,⁶ and if different constructions be given by the courts of several States, formed out of parts of the same territory, to the same general law, such different constructions are binding on the federal courts sitting in said States.⁷ Where a federal court is called on to construe the laws of a State, in a litigation between parties before it, it is its duty to follow the decisions of the courts of the State, as to such construction.⁸

[The federal courts do not adopt the decisions of the State courts, on the construction of a compact between

¹ Loring v. Marsh, 2 Cliff, 311.

² Gelpcke v. Dubuque, 1 Wall. 175; Mitchell v. Burlington, 4 Wall. 270; Larned v. Burlington, 4 Wall. 275.

³ State Bank of Ohio v. Knoop, 16 How. 369. See Pease v. Peck, 18 How. 595; Rowel v. Runnels, 5 How. 134.

⁴ City of Kenosha v. Lamson, 9 Wall. 477.

⁵ Fowler v. Hecker, 4 Bl. C. C. 425.

⁶ Smith v. Shriver, 14 Leg. Int. 172; s. c. 3 Wall. Jr. C. C.; Dike v. Kuhns, 5 Pitts. L. J. 239; Loring v. Marsh, 2 Cliff, 311.

⁷ Christy v. Pridgeon, 4 Wall. 96.

⁸ Van Bokelen v. Brooklyn City Railroad Co. 5 Bl. C. C. 379; Blossburg and Corniog Railroad Co. v. Tioga Railroad Co., 5 Bl. 379; Loring v. Marsh, 2 Cliff, 311, 469.

the States,¹ nor on a question of equity law,² nor on the construction of contracts, nor questions of general commercial law,³ nor on the construction of a deed by the rules of the common law,⁴ nor upon the construction of a private statute,⁵ nor upon an incidental point not in question in the cause,⁶ nor upon a question of construction of the federal Constitution,⁷ nor upon the construction of a will unless it arises from a settled rule of property.⁸

[Where a question involved in the construction of State statutes, practically affects those remedies of creditors which are protected by the Constitution, the Supreme Court will exercise its own judgment on the meaning of such statutes, irrespective of the decisions of the State courts.⁹]

SECTION II.

OF CIRCUMSTANCES WHICH MAY INCREASE THE VALUE OF AN AUTHORITY.

A NAME often augments the authority of a judgment, or opinion.¹⁰ Such a name is,—

¹ *Marlatt v. Silk*, 11 Pet. 1.

² *Neves v. Scott*, 13 H. 268; *Flagg v. Mann*, 2 Sum. 491. *Mayer v. Foulkrod*, 4 W. C. C. 349; *McFarlane v. Griffith*, 4 W. C. C. 585; *Burt v. Keyes*, 3 West. L. Mo. 290.

³ *Swift v. Tyson*, 16 Pet. 1; *Donnell v. Columbian Ins. Co.*, 2 Sum. 367; *Thomas v. Hatch*, 3 Sum. 170; *Carpenter v. Wash. Ins. Co.* 16 Pet. 495; *Robinson v. Commonwealth Insurance Co.*, 3 Sum. 221; *Williams v. Suffolk Insurance Co.*, 3 Sum. 270; s. c. 13 Pet. 415; *Gloucester Insurance Co. v. Younger*, 2 Curt. 322; *Bragg v. Meyer*, 1 McL. 408; *Browning v. Andrews*, 3 McL. 576; *Austin v. Miller*, 5 McL. 153;

s. c. 13 H. 218; *Mutual Safety Insurance Co. v. The cargo of the George, Olc.* 89.

⁴ *Foxcroft v. Mallett*, 4 H. 353; *Chicago v. Robbins*, 2 Bl. 419; *Thomas v. Hatch*, 3 Sum. 170.

⁵ *Williamson v. Berry*, 8 How. 496.

⁶ *Carroll v. Carroll*, 16 How. 275.

⁷ *Jefferson Branch Bank v. Skelly*, 1 Bl. 436.

⁸ *Lane v. Vick*, 3 How. 464.

⁹ *Butz v. Muscatine*, 8 Wall. 575.

¹⁰ 5 Durn. and E. 556; 6 Durn. and E. 428; 7 Durn. and E. 743; 4 East, 150; 7 Price, 347; 1 Brod. and B. 195; 2 Biog. 295; 5 Ves. 538; 1 Crompt. and M. 308-312.

Littleton:¹

Coke:²

[Bridgman,—“It is due to the memory of so great a man,” said Lord Chancellor; Nottingham, “when- ever we speak of him, to mention him with reverence and with veneration, for his learning and integrity;” and Lord Ellenborough pronounced him, “a most eminent judge, distinguished by the profundity of his learning and the extent of his industry.”]

Brooke:³

Popham,⁴ “a very able judge:”⁵

Hale,⁶ “one of the ablest and most learned judges that ever adorned the profession;”⁷ “as correct, as learned, and as humane a judge, as ever graced a bench of justice;”⁸ “one of the greatest and best men who ever sat in judgment:”⁹

Hobart,¹⁰ “a very great man;”¹¹ “as great a man as ever lived:”¹²

Winch:¹³

Hutton:¹⁴

Twisden, “a very able lawyer;”¹⁵ a name “of great authority:”¹⁶

Wyndham, a name “of great authority:”¹⁷

¹ Willes, 332.

² 2 Lord Raym. 1488; Willes, 332; 3 East, 582; 2 Bing. 295, 297; 1 M'Clel. and Y. 319; 3 Atk. 136, 141.

³ 1 W. Bl. 140; 1 Eden, 199.

⁴ 6 Co. 75; Cro. Jac. 166.

⁵ By Eyre, C. J., 1 Bos. and P. 610, 3 Ves. 674.

⁶ 2 Lord Raym. 1488; Willes, 543, 666; 4 Durn. and E. 311; 5 Durn. and E. 556; 3 Maule and S. 5, 6; 1 M'Clel. and Y. 318; 3 Atk. 136; 2 Eden, 64.

⁷ By Lord Henley, 1 Eden, 252, 1 W. Bl. 182.

⁸ By Grose, J., 3 East, 582.

⁹ By Lord Kenyon, 1 East, 314.

¹⁰ Willes, 332; 6 Durn. and E. 441.

¹¹ By Willes, C. J., 2 Wils. 78.

¹² By Willes, C. J., 1 Wils. 55.

¹³ 6 Durn. and E. 441.

¹⁴ *Ibid.*

¹⁵ By Lord Kenyon, 3 Durn. and E. 17.

¹⁶ By Lord Kenyon, 3 Durn. and E. 631.

¹⁷ By Lord Kenyon, 3 Durn. and E. 631.

Nottingham,¹ "very great in the knowledge of law and equity;"² "that great judge, styled the father of equity:"³

Somers:⁴

Holt,⁵ "that great man;" "a man above all praise;"⁶ "whose name gives a sanction to everything he said;"⁷ "than whom few more able lawyers ever sat in Westminster Hall:"⁸

Powell, "a lawyer of no mean talent and acquirements;"⁹ "one of the most learned judges of his day;"¹⁰ "who fell little short of Lord Holt himself:"¹¹

Gould:¹²

Turton:¹³

Treby:¹⁴

Cowper,¹⁵ "that great master of equity:"¹⁶

Macclesfield, "a great common lawyer;"¹⁷ a very great chancellor;¹⁸ "an able judge both in law and equity as ever sat on the bench:"¹⁹

Talbot, a man "of consummate knowledge;"²⁰ a very great chancellor:²¹

¹ 7 Durn. and E. 743.

² By Lord Henley, 1 Eden, 249.

³ By Sir R. P. Arden, 5 Ves. 858.

⁴ 7 Durn. and E. 743; 4 Ves. 342.

⁵ 2 Eden, 64; 7 Durn. and E. 743;

¹⁴ East, 145, 146, 151; 1 McClel. and Y. 317, 318.

⁶ By Lord Kenyon, 7 Durn. and E. 743.

⁷ By Lord Kenyon, 6 Durn. and E. 423.

⁸ By Hullock, B., 3 Younge and J. 112.

⁹ By Bayley, J., 6 Bing. 38.

¹⁰ By Lord Tenterden, 3 Barn. and Adol. 270.

¹¹ By Lord Kenyon, 7 Durn. and E. 743.

¹² 5 Durn. and E. 385.

¹³ *Ibid.*

¹⁴ Willes, 666.

¹⁵ 7 Durn. and E. 743; 1 Turn. and R. 101.

¹⁶ By Lord Chancellor Parker, 1 P. W. 543.

¹⁷ By Lord Eldon, 1 Turn. and R. 101.

¹⁸ By Willes, C. J., Willes, 472.

¹⁹ By Lord Redesdale, 2 Sch. and Lef. 632.

²⁰ By Sir L. Kenyon, 1 Cox, 248.

²¹ By Willes, C. J., Willes, 472.

Jekyll, a man "of consummate knowledge:"¹

Hardwicke,² a great common lawyer;³ "a great authority;"⁴ and of whom Lord Kenyon has thus spoken,—“I am old enough to remember that great judge, though but for a short time, before he left the Court of Chancery; and the knowledge of those, who lived before me, only fortified me in the opinion I formed of him, that his knowledge of the law was most extraordinary; he had been trained up very early in the pursuit, he had great industry and abilities, and was, in short, a consummate master of the profession:"⁵

Comyns,⁶ "a very able common lawyer;"⁷ "a very great judge;"⁸ "considered by his cotemporaries as the most able lawyer in Westminster Hall:"⁹

Mansfield,¹⁰ "the great Lord Mansfield;"¹¹ "the founder of the commercial law of this country;"¹² a "very eminent judge;"¹³ "one of the greatest judges that ever sat in Westminster Hall;"¹⁴ who will be remembered as long as the law of England or of Scotland exists:¹⁵

Northington, "a great lawyer;"¹⁶ "a very excellent equity judge:"¹⁷

¹ By Sir L. Kenyon, 1 Cox, 248.

² 5 Ves. 508; 7 Price, 277; 1 Sch. and Lef. 292; 1 Ball and B. 552.

³ By Lord Eldon, 1 Turn. and R. 101.

⁴ By Lord Kenyon, 3 Durn. and E. 371.

⁵ 7 Durn. and E. 416.

⁶ 3 Durn. and E. 631; 8 Durn. and E. 378.

⁷ By Lord Hardwicke, 3 Atk. 16.

⁸ By Alexander, C. B., McClel. 127.

⁹ By Lord Kenyon, 3 Durn. and E. 64.

¹⁰ 6 Durn. and E. 423; 7 Durn. and E. 222; 8 Durn. and E. 23; 2 Bing. 309; 7 Price, 347; 1 Crompt. and M. 308, 309.

¹¹ By Alexander, C. B., McClel. 449.

¹² By Buller, J., 2 Durn. and E. 73.

¹³ By Lord Eldon, 2 Dow, 306.

¹⁴ By Lord Eldon, 1 Dow and Cl. 543.

¹⁵ By Lord Eldon, 2 Dow, 311.

¹⁶ By Lord Eldon, 6 Ves. 640.

¹⁷ By Graham, B., 10 Price, 278.

Chief Justice Willes, "no mean authority;"¹ "certainly a very great common lawyer:"²

Thurlow,³ "a great judge:"⁴

Eyre, "who was always considered to be a strong-headed man."⁵ [On an occasion in which Lord C. J. Eyre was quoted at the bar as having given two contradictory decisions, Lord Eldon said,—“His name has great authority with me, particularly on questions relating to tithes. His judgment was very elaborate, and generally in writing; and when the energy of mind which he applied to them is considered, I am surprised that it could be supposed that he had contradicted himself, and decided differently in the two cases. I think that, upon an attentive perusal, they will be found to be reconcilable.”⁶]

Alvanley,⁷ "one of the safest guides in Westminster Hall:"⁸

De Grey, "a most learned judge;"⁹ "a very eminent judge:"¹⁰

Denison, "a most excellent lawyer:"¹¹

Heath, "a very learned judge;"¹² an eminent lawyer;¹³ a judge "eminently versed in the knowledge of conveyancing:"¹⁴

Chambre,¹⁵ an "eminent lawyer;"¹⁶ "whose opinion is entitled to great weight:"¹⁷

¹ By Park, J., 3 Bing. 549.

² By Lord Eldon, 7 Price, 509.

³ 3 Ves. 630; 5 Ves. 538; 10 Price, 278.

⁴ By Sir R. P. Arden, 4 Bro. C. C. 511.

⁵ By Richards, C. B., 10 Price, 42.

⁶ 1 Jac. 370.

⁷ 15 East, 198; 3 Dow, 11.

⁸ By Best, C. J., 4 Bing. 242.

⁹ By Lord Ellenborough, 14 East, 148, 149.

¹⁰ By Lord Eldon, 6 Bing. 22, 3 Bligh's New Rep. 156.

¹¹ By Park, J., 12 Moore, 183.

¹² By Abbott, C. J., 5 Barn. and Cr. 576.

¹³ By Park, J., 9 Bing. 641.

¹⁴ By Lord Eldon, 10 Ves. 263.

¹⁵ McClel. 632; 4 Moore and P. 70.

¹⁶ By Park, J., 9 Bing. 641.

¹⁷ By Lord Ellenborough, 4 East, 150.

Ashhurst,¹ who "was always reckoned a learned judge:"²

Buller,³ "of whose high legal character all the profession formed a very just estimate:"⁴

Gibbs, "one of the most learned and acute judges that ever sat in Westminster Hall:"⁵

Richards, "very learned;"⁶ "an eminent equity judge;"⁷ and "than whom," observes Hullock, B., in the Court of Exchequer, "an abler equity lawyer never sat here:"⁸

Burrough,⁹ "a man who for legal knowledge, and sound and correct understanding, was of no ordinary size:"¹⁰

Tenterden, "eminently learned and accurate:"¹¹

Eldon, "the greatest judge in this country."¹²

The proposition that a name may augment the value of a judgment, or opinion, needs, perhaps, no proof. A proof is, however, supplied in the references affixed to the distinguished names above mentioned. And further proof is furnished by the following, among other,¹³ clear judicial expressions on the matter: "There is one opinion entitled to great respect, considering the person by whom it was pronounced; I mean the opinion of Lord Coke:"¹⁴ "The case cited from Ventris ought not to be treated lightly, or overturned without great consideration, because it has the

¹ 5 Taunt. 671.

² By Park, J., 1 Crompt. and M. 310.

³ 5 Taunt. 671.

⁴ By Park, J., 1 Crompt. and M. 310. See also 8 Durn. and E. 593.

⁵ By Lord Tenterden, 2 Barn. and Adol. 697.

⁶ By Sir T. Plumer, 1 Turn. and R. 252.

⁷ By Lord Lyndhurst, 1 Dow and Cl. 150.

⁸ McClel. 24; 13 Price, 73.

⁹ 1 Crompt. and M. 311.

¹⁰ By Park, J., 8 Bing. 534.

¹¹ By Tindal, C. J., 1 Crompt. and M. 322.

¹² By Sir T. Plumer, 2 Madd. 433.

¹³ 1 Crompt. and M. 308-312.

¹⁴ By Best, C. J., 2. Bing. 295.

sanction of Lord Hale's name : " ¹ " The concurrence of men of such talents as Lords Nottingham, Somers, Holt and Cowper is nearly equal in authority to an express decision : " ² " When I consider the great reputation of the judges, of whom the court was composed, when the case of *H. v. S.* was determined (my Lord Mansfield and Mr. Justice Aston being then on the Bench), it is in my estimation of the highest authority." ³

The authority of a case is increased by the circumstance, that it was decided by, or with the concurrence of, a judge peculiarly skilled in the particular branch of law, relating to the case ; as—

Lord Talbot, " one of the greatest real property lawyers, that ever filled the office of lord chancellor : " ⁴

Lord Alvanley, " who, to a very sound judgment, joined a very accurate knowledge of the law of real property ; " ⁵

Sir J. Jekyll, a very great judge upon all questions of bequest : ⁶

Lord Mansfield, " who may be truly said to be the founder of the commercial law of this country ; " ⁷ and of whom, with reference to some cases on marine insurance, Lawrence, J., has thus spoken :—That these decisions have had great weight in the courts of common law will not be wondered at, if it be recollected that they had the authority of Lord Mansfield, whose mind, when he filled the office of solicitor general, had been particularly turned to the consideration of questions of prize, and who accord-

¹ By Lord Kenyon, 5 Durn. and E. 556.

² By Ashurst, J. 7 Durn. and E. 743.

³ By Graham, B., 7 Price, 347. 1 Brod. and B. 195.

⁴ By Bayley, J., 6 Barn. and Cr. 315.

⁵ By Lord Ellenborough, 15 East, 198.

⁶ 3 Ves. 630.

⁷ By Buller, J., 2 Durn. and E. 73.

ing to the account of Sir W. Blackstone (Comm. vol. III. 70,) attended and conducted all the decisions of the Cockpit during the whole of the war, which began in the year 1756, and whose masterly acquaintance with the law of nations was known and revered by every state of Europe :¹

Denison, J., "a pleader of the first eminence ;"² "than whom no person was ever better versed in the rules of special pleading :"³

Chambre, J., "that very able pleader :"⁴

Gibbs, C. J., "than whom no judge was ever more perfectly acquainted with the rules of pleading ;"⁵ "a lawyer of great eminence in every department of his profession, and peculiarly skilled in the science and practice of pleading ;"⁶ "a man most eminent for his knowledge of commercial law :"⁷ "no man had more knowledge of commercial law than Chief Justice Gibbs :"⁸

Lord Macclesfield, "a great master of evidence :"⁹

Lee, C. J., "who was peculiarly conversant in sessions' law :"¹⁰

Aston, J., of whom Lord Kenyon has thus spoken,—
"The authority of Aston, J., is in all cases worth resorting to, but peculiarly so in cases of sessions' law, in which he was remarkably conversant :"¹¹

Eyre, C. B., "unquestionably a great authority upon subjects of revenue :"¹² [A "clear headed judge." ¹³]

¹ 3 Bos. and P. 527.

² By Sir J. Mansfield, 2 Bos. and P. New Rep. 201.

³ By Lord Kenyon, 1 East, 650.

⁴ By Bayley, B., 1 Crompt. and J. 573.

⁵ By Abbott, C. J., 1 Barn. and Cr. 251.

⁶ By Abbott, C. J., 3 Barn. and Cr. 323.

⁷ By Park, J., 3 Bing. 391.

⁸ By Park, J., 5 Bing. 547.

⁹ By Willes, C. J., Willes, 23.

¹⁰ By Lord Kenyon, 8 Durn. and E. 181.

¹¹ 4 Durn. and E. 735. And see 7 Price, 347.

¹² By Lord Eldon, 8 Ves. 250.

¹³ Thomas J. Hilliard v. Richardson, 3 Gray, 349.

Lord Kenyon, "who was peculiarly well versed in the law of real property;"¹ who possessed great information on the subject of piracy of books:²

Heath, J., who possessed great knowledge of the law of real actions:³

And here it may be mentioned, that Lord Ellenborough, speaking of two cases on a writ of extent to levy a crown debt, appears to attach additional weight to them, because "Lord Chief Justice De Grey and Lord Kenyon, who concurred in these judgments, had been attorneys general and must have been conversant with the rights of the crown upon such questions."⁴ And this occasion offers an opportunity to observe, that the Court of Exchequer may be represented as understanding more of revenue law than the Court of Chancery.⁵

A judgment, or opinion, of a judge may sometimes derive a peculiar weight, from some particular judicial quality or character of him.⁶ Judges, which, on this head, may be named are,—

Lord Trevor, "a man most liberal in his constructions;"⁷ "who had a freer way of thinking than most of the common law judges:"⁸

Lee, C. J., as cautious and painstaking a judge, as ever presided in the Court of King's Bench:⁹

Wright, J., "who was one of the strictest law judges, that ever sat in Westminster Hall:"¹⁰

Lord King, who was as willing to adhere to the com-

¹ By Lord Eldon, 2 Dow, 254.

² By Lord Eldon, 2 Russ. 399.

³ By Park, J., 9 Bing. 640.

⁴ 16 East, 259, 260. See also 8 Price, 308.

⁵ 8 Ves. 252.

⁶ 1 Ves. Jun. 17; 1 Kenyon, 71; 7

Durn. and E. 418, n.; 2 East, 114; 2 Sch. and Lef. 631, 632.

⁷ By Lord Hardwicke, 1 Ves. Jun. 17.

⁸ By Lord Hardwicke, 1 Kenyon, 71, 7 Durn. and E. 418, n.

⁹ By Lord Kenyon, 2 East, 114.

¹⁰ By Lord Mansfield, 5 Durn. and E. 386.

mon law, as any judge that ever sat in the Court of Chancery :¹

Lord Camden, who is represented to have examined in a case before him the whole question, "with that accuracy which peculiarly belonged to him :"²

Le Blanc, J., "a most accurate judge."³

Sir Thomas Plumer, than whom "no man had more industry and research."⁴

The authority of a case may, moreover, be strengthened by the following circumstances; and from which it will be seen, that the most common sources of that strength are, the learning of a judge or court; the unanimity of the court; the deliberate consideration of the case; the eminence of the counsel who argued it; or the fact that it has been acquiesced in, or not appealed from.

Thus, a case has borne an augmented weight, for these reasons :—

1. It was decided by most learned judges ;⁵ by a "strong" court.⁶ ["I should consider," said Chief Justice Reeve, in *King v. Middleton Insurance Company*,⁷ "a decision in that commercial State (New York), by a court (the Supreme Court), so highly respectable, and respecting a subject (insurance), to which their attention is so often called, of very high authority." "The same doctrine has been repeatedly recognized by the chancellor, and by the judges of the Supreme Court of the state of New York, who are justly ranked among the most enlightened jurists of this, or of any other nation."⁸]

¹ By Lord Harwicke, 3 Atk. 654.

² By Lord Redesdale, 2 Sch. and Lef. 631, 632.

³ By Lord Tenterden, 2 Barn. and Adol. 857.

⁴ By Alexander, C. B., M'Clell. 565.

⁵ 6 Bing. 22; 7 Price, 347.

⁶ *Prince v. Nicholson*, 5 Taunt. 671.

⁷ 1 Conn. 205.

⁸ *The State v. Ellis*, 3 Conn. 190.

2. It was decided by a unanimous court.¹

3. It was decided "after consideration."²

4. Infinite pains were taken with it: it was twice argued at the bar; and judgment was not given till some time after the second argument.³

5. It is the decision of Lord Hardwicke, "so great a man," who must have taken very considerable pains with the case, a case which must have undergone much consideration by him.⁴ ["There is the authority of Lord Hardwicke upon the point, which would weigh down the most considerable doubt that I could be disposed to entertain."⁵ "I feel a strong inclination of opinion upon this question; but I shall not hold any opinion of my own without doubt, when the master of the rolls (Sir William Grant), has held directly the contrary."⁶ "I feel that in differing from so great a judge, my own decision will not hereafter possess all the authority which might otherwise attach to it."⁷]

6. It is the decision of a judge, who at first entertained an opinion different from his decision. "Lord Bathurst's judgment in *L. v. L.* is a positive decision, and is entitled to the greater weight, because when the point came first before him he entertained a different opinion."⁸

7. It is a case, which a judge at first objected to, but to which, on consideration, he has yielded his assent. "*S. v. C.* was at first a good deal cavilled at and objected to. The way, however, in which those objections—objections evidently taken *per incuriam*—

¹ Co. Litt. 254 a; 6 Durn. and E. 409; 7 Price, 86.

² 6 Durn. and E. 656.

³ 4 Durn. and E. 568.

⁴ 5 Ves. 500.

⁵ Per Lord Eldon, 6 Ves. 126.

⁶ Per Lord Eldon, *James v. Dean*, 11 Ves. 391.

⁷ Per Lord Eldon, *Mills v. Farmer*, 1 Meriv. 94.

⁸ 1 Turn. and R. 257.

have yielded to further inquiry and reflection, greatly adds to its weight as an authority. In *P. v. S.*, Lord Alvanley in the first breaking of the case expressed an opinion extremely adverse to *S. v. C.* . . . This was upon the first argument of the case. When he next comes to consider the question, however, after an interval of nine or ten days had given him time to reconsider the matter, and to reflect a little upon the authority of *S. v. C.*, his lordship takes a very different view. . . . I consider his lordship's opinion in favor of that case as a grave authority; and what renders his assent to it the more valuable is, that it was yielded slowly and with reluctance, and as the result only of further consideration."¹

8. It is a case, in which a point was settled by Lord Thurlow, upon great deliberation, and after he had consulted the judges upon it. "The decision is therefore of very high authority."²

9. It is a case, wherein the Lord Chancellor called to his assistance judges of the courts of law. "It is true that *R. v. R.* was a case in bankruptcy; but the Lord Chancellor called to his assistance Lord Ch. J. Lee, Lord Ch. B. Parker, and Mr. Justice Burnett; so that the principle, on which the court there acted, must be considered as having received most authoritative sanction. These eminent individuals, and particularly the Lord Chief Baron, and Mr. Justice Burnett, did not, in the view which they took of the question before them, confine themselves to the case of bankruptcy, but stated grounds of judgment which are of general application."³

¹ By Lord Brougham, 1 Russ. and
M. 478-481.

² 11 Ves. 411.

³ 3 Russ. 58.

10. It is a case determined by an eminent judge, who had recently considered the whole of the subject in another cause.¹

11. It is a case wherein former authorities were reviewed.² ["The case was elaborately argued, and the reported opinions show that all the authorities on the subject were before the court, and were carefully considered. It is a clear authority, and it is not necessary to go further in the citation of cases."³]

12. It is a case attended with one or more of these circumstances—Eminence of counsel;⁴ deliberation, and solemnity of decision;⁵ parties' acquiescence; absence of appeal.⁶ On this matter, the following judicial opinions on different cases are express and full authority.—"This case is not at all affected by the statute 32 Henry VIII. *N. v. A.* was decided many years after that statute had passed; and considering who the counsel were who argued that case, it would be singular, if there had been any ground for making the objection now urged, that it should not have then been made.⁷ *B. v. L.* is "a direct decision upon the point, certainly without argument; but the counsel, whose learning we all know, and who was never forward to give up a case which he thought he could support, abandoned it."⁸ "The last case is *B. v. L.* Certainly it was not argued, but it is a most positive decision; and the counsel was certainly a most experienced advocate, and not disposed to abandon tenable points."⁹ "If the parties were dissatisfied with

¹ 2 Russ. and M. 195.

193, 195, 449; 1 Crompt. and M. 309;

² 1 Ves. Jun. 495; 1 Sch. and Lef. 319; 8 Price, 308.

1 Sch. and Lef. 271.

³ 7 Durn. and E. 416; M'Clel. 195

⁴ Hunt J. *Elias v. Farley*, 5 Abb. Pra. R. 43 N. S.

1 Crompt. and M. 309.

⁶ 7 Durn. and E. 416.

⁷ 7 Durn. and E. 416; M'Clel. 192,

⁸ 8 Taunt. 727.

⁹ 5 Taunt. 157. ⁹ 5 Taunt. 163.

the decision in the case cited of *B. v. W.*, they might have questioned its propriety in the House of Lords by appeal; but as that decision was acquiesced in, when the parties had an opportunity of going to the appellant jurisdiction, it has acquired some weight by that circumstance.”¹ *B. v. C.* “was by no means a rash determination. The case was argued with all the ability of the bar; and the chancellor determined it upon full consideration.”² “The case of *B. v. B.* seems to have settled the law on this point, it being a resolution given on great consideration, in which the Lord Cowper, when of counsel, discouraged a writ of error in parliament.”³ And Lord Henley, speaking of a case determined by himself, says—“There was, as I remember, an appeal to the House of Lords, which was deserted; and therefore the acquiescence of the bar in that judgment, is what makes it, after mature consideration, a considerable authority with me, though it was a judgment of my own.”⁴ Mr. Justice Buller thus speaks of a body of decisions:—“I know no reason why these decisions should not be as religiously and as sacredly observed, as any judgment, in any time, by any set of men. I believe they are founded in good sense, and are adapted to the transactions, the understanding, the welfare and interest of mankind. Many of them have to recommend them a circumstance ordinarily of weight in judgment. They were determined on facts apparent on the record, and writs of error might have been brought upon them; but the reasons on which they were founded were so satisfactory, not only to the parties who were most essen-

¹ By Lord Kenyon, 7 Durn. and E. 252.

² 2 P. W. 524.

⁴ 1 Eden, 434.

³ 2 Ves. Jun. 301.

tially interested in the event, but to the profession, that no writ of error ever has been brought.”¹

13. It is a case affirmed on appeal to the House of Lords. “*E. v. E.* is a very strong case. I have examined the register’s book; and it is right, as reported. The decree of Lord Cowper was affirmed; therefore it is a very high authority.”² “*T. v. W.* is a case of the highest authority; especially valuable for the clear and able manner in which the argument is put in the judgment of Lord Erskine, who did not deliver his opinion, till he had given the fullest deliberation to the question, and taken great pains to satisfy his mind. His lordship states his reasons with his usual distinctness; they are such as to carry complete conviction with them; and at all events, they have since received the sanction of the House of Lords.”³ “I consider *S. v. B.* to be a case of great authority; for, independently of the talents of the persons by whom it was argued, it was before all the judges; and Lord Eldon, and all the other judges, except Lord Thurlow, concurred in the propriety of the decision.”⁴ *A. v. V.* is “a case of the highest authority, because it was originally determined here (Court of Chancery) by Lord Macclesfield, and his decree was affirmed by the House of Lords, after questions put to all the judges.”⁵

Similar reasons may augment the value of *nisi prius* cases.⁶ Accordingly, the bench has said:—The case before Lord Chief Justice Holt is directly in

¹ 2 Bro. C. C. 385.

² By Sir R. P. Arden, 4 Ves. 833.

³ By Lord Brongham, 1 Russ. and M. 254.

⁴ By Alexander, C. B., 3 Younge and J. 286.

⁵ By Lord Commissioner Eyre, 1 Ves. Jun. 495, 4 Bro. C. C. 8.

⁶ See, besides the authorities after mentioned, 3 Anstr. 701, 15 Ves. 262, and 2 Crompt. and M. 86.

point; "which, though only a *nisi prius* case, and that not an absolute decision, yet was the opinion of a judge, whose name gives a sanction to every thing he said."¹ And Abbott, C. J., relying on three *nisi prius* cases, observes—"It is true, that all the three were decisions at *nisi prius*, but they were the decisions of a very great judge, and were not afterwards brought before the court."² and, again—"The cases of *D. v. B.* and *S. v. W.*, and the case of Sir H. H., were decisions at *nisi prius*, but they were the decisions of a very learned judge; they were capable of revision; they were not afterwards questioned; and the last of the three bears directly upon the question in the present case."³ So Graham, B., grounding his opinion on a *nisi prius* commercial case, which came before Lord Kenyon, observes on that case—"Considering what able men were counsel upon that occasion, it is not to be supposed for a moment, that if that decision could have been at all questioned, it would not have been carried further. But all the world acquiesced in it; the parties and their counsel acquiesced in it, and the conduct of the parties is a great matter in these mercantile transactions. They see, and know, and understand the language of the Royal Exchange, and the course of commercial dealings, and they would therefore, if that decision could have been questioned, have carried it further."⁴ Lord Kenyon speaks of two *nisi prius* decisions of his own in these terms:—"I certainly should not rely on the cases decided before me at *nisi prius*, but those cases have been since recognized in the Court of Common

¹ 6 Durn. and E. 423.

² 5 Barn. and Cr. 575.

³ 5 Barn. and Cr. 577.

⁴ 1 M'Clel. and Y. 191.

Pleas.”¹ “If the case of *S. v. G.* had been merely a determination of my own at *nisi prius*, I should not have relied upon it at all; but being pressed by the plaintiffs’ counsel at the trial, I afterwards consulted the other judges of this court (King’s Bench), who all concurred in the opinion I gave at Guildhall. That case therefore has by that mean acquired an authority beyond a mere *nisi prius* decision.”²

Lord Kenyon, expressing his surprise, that, in a cause tried before himself, the case came to be reserved for the opinion of the court in bank, adds, “For I have decided the same question repeatedly at the sittings, and the propriety of my decision has never been canvassed again upon a motion for a new trial.”³ [“The circumstance of no writ of error having been brought to reverse any of these judgments, is a strong proof of the universal opinion of the profession upon this subject.”⁴]

The circumstance, that an ancient decision has been from time to time acted on, stamps it with augmented authority.⁵ “Undoubtedly,” observes Best, C. J., “every respect is due to an ancient decision, when from time to time it has been acted upon. *Vires acquirit eundo*: by passing down a series of years, and being from time to time recognized by every writer, ancient decisions acquire a degree of authority which does not belong to modern decisions;—not for being more consonant with justice, but that they have the sanction of time.”⁶

Lastly, it may be noticed, that certainly a case is

¹ 7 Durn. and E. 397.

² 6 Durn. and E. 409.

³ 1 East, 50.

⁴ *King v. Lynn*, 2 T. R. 735, per

Lord Kenyon, cited *Middleton v. Lynn*,
5 Conn. 98.

⁵ 7 Durn. and E. 419.

⁶ 2 Bing. 301.

strengthened by its being cited with approbation by some text-writer of authority; as by Mr. Justice Buller in his work on the law of *nisi prius*.¹

SECTION III.

OF CIRCUMSTANCES WHICH MAY LESSEN THE VALUE OF AN AUTHORITY.

THE AUTHORITY of a case may be lessened by the following, amongst other,² circumstances.

A case has borne a diminished weight, for these reasons:—

1. The decision was made without argument:³ the case was not argued, but passed without discussion:⁴

2. The case was decided without much consideration.⁵

3. It was very shortly argued; in great haste determined; and it does not appear to have received all that consideration from the court, which it deserved.⁶

4. The court were equally divided,⁷ or were not unanimous,⁸ in opinion: [In *Mansfield v. Doolin*,⁹ Whiteside, Chief Justice, refused to accept Horton

¹ 2 Russ. and M. 165.

² 1 Stra. 209; 3 Durn. and E. 130—132, 496, 518; 7 Durn. and E. 743; 3 Baro. and Ald. 232; 2 Barn. and Cr. 655; 3 Barn. and Adol. 47; 3 Taunt. 284; 4 Taunt. 354; 1 Brod. and B. 207; 2 Brod. and B. 580; 2 Bing. 297—303; 6 Price, 123, 124; 7 Price, 365; 13 Price, 168; M'Clel. 59; 5 Ves. 858; 1 Russ. and M. 270; 2 Ball and B. 451, 452. Of the "acknowledged inaccuracy of the Court of Exchequer" in Ireland at a certain

period, see 2 Ball and B. 404, 405, and 1 Sch. and Lef. 396.

³ 2 Glyn and J. 315; 4 Sim. 150, 151; 1 Russ. 64.

⁴ 9 East, 161—164.

⁵ 3 Durn. and E. 131.

⁶ 3 Bos. and P. 650, 651.

⁷ Dougl. 328, ed. 1783; 2 Durn. and E. 140; 3 Durn. and E. 631; 14 East, 621.

⁸ 5 Durn. and E. 257; Cooper, 267; M'Clel. 632.

⁹ Irish Rep. 4 C. L. 17.

v. Sayer,¹ as an authority, because among other reasons, "the judgments of the several members of the court, proceeded on different grounds.""]

5. The cause was an amicable one,² or heard by consent,³ or not opposed.⁴ [The case of *Regina v. Clarke*⁵ was held not to be a binding authority, because it was decided on an *ex-parte* hearing.⁶ For "no sentence of any court is entitled intrinsically to the least respect in any other court or elsewhere, when it has been pronounced *ex-parte* and without an opportunity for defence."⁷ But in the *People ex relatione, Bendon v. The County Judge of Rensselaer*, Harris, J., held,— "The fact that⁸ no objection appears to have been made to the right of the court to review these judgments, should not impair the value of the precedent.""]

6. It is a case, where the decree, or order, was made by consent:⁹

7. It is a case, where the decision is contrary to a prior decision of the same court, which earlier case was unknown to the counsel by whom the latter case was argued, and probably to the court also:¹⁰

8. It is a case, where a judge, who joined in the decision, had been of a different opinion in an earlier case, which was not mentioned when the latter case was decided:¹¹

9. It is a decision, in giving which the court was misled by a case of no weight, but on which it

¹ 4 H. and N. 643.

² 7 Durn. and E. 437. See 2 Younge and J. 623.

³ 1 Russ. 48, 64; 3 Russ. 87; 1 West's Cas. T. Hardw. 691.

⁴ 2 Glyn and J. 366.

⁵ 7 Moore's P. C. Cas. 77.

⁶ *Reg. v. Hughes*, Law Rep. 1 P. C. Cas. 92.

⁷ *Irby v. Wilson*, 1 Dev. and Bat. Eq. 576.

⁸ 13 How. Pra. Rep. 401.

⁹ 3 Ves. 713; 1 Russ. 48; 3 Russ. 87.

¹⁰ 2 Brod. and B. 593, 594; 7 Price, 503.

¹¹ 9 East, 161-164.

grounded its decision: "As it appears the decision in the Court of King's Bench was founded on the authority of the case in Fitzherbert; if that case ought to have no weight, then little attention is due to the decision founded on such authority:"¹

10. It is a case, in which there was no final judgment: "There was no final judgment in *R. v. W.* which detracts from its authority:"²

11. It is a case compromised:³ "The authority of *H. v. S.* is as great as that of a single judge can be, but there was an appeal from the decision, attended by a compromise, which seriously affects the case:"⁴

12. The reasons of the judgment are not disclosed in the report, and the case itself is not mentioned in any other book:⁵

13. "The case is reported in a book, that is very incorrect:"⁶

14. "The case is too loosely reported to be relied on:"⁷

[*Stoney v. American Life Ins. Co.*,⁸ "said to be so badly reported that it is difficult to say what questions arose."⁹]

15. "It is a very short and loose report:"¹⁰

16. It is a case, the note of which contains some positions entirely repugnant to every principle of law:¹¹

17. It is anonymously reported:¹²

¹ 2 Bing. 292, 297-303.

² 1 Turn. and R. 230.

³ *Scott v. Tyler*, 2 Bro. C. C. 489, cited 7 Ves. 169.

⁴ 1 Turn. and R. 226, 230.

⁵ 3 Durn. and E. 316.

⁶ 3 Atk. 318.

⁷ 2 Durn. and E. 475; 3 Durn. and E. 261, 263; 2 Crompt. and M. 42.

⁸ 11 Paige, 635.

⁹ *Denio, C. J., Farmers' Bank v. Butchers' Bank*, 14 N. Y. 623.

¹⁰ 2 Cox, 30.

¹¹ 7 Durn. and E. 269.

¹² 3 Durn. and E. 130, 261; 1 East, 216.

18. It is a circuit case, of which there is no note or report, and which has been cited from some imperfect recollection:¹

19. It is a case determined by Lord Clarendon, "who, after an absence from courts of justice for many years, was then recently returned to this country, and had not been for some time in habits of business:"²

20. It is a case, with the order made in which the judge, who made it, has expressed himself dissatisfied:³

21. It is a case now *sub judice*: "Rogers v. Earle"⁴ is no authority, being now *sub judice*.⁵

The weight of a particular opinion of Chief Justice Vaughan is stated to be greatly weakened for these reasons:—"It was upon a motion, without much consideration; another judge of the court declared himself of a contrary judgment, and the other two declared no opinion at all on the question; so that it comes only to the opinion of a single judge against another, and all this upon a point not properly in the cause."⁶

[A case in which the particular question was not raised, although involved in it, is of little weight.⁷ "In regard to this case it is proper to say the point was not necessarily involved, and this, therefore, is not to be regarded as authority."⁸ "In *Trimbey v. Vignier*, 1 Bing., N. C. 151, the Court of Common Pleas seem to have misunderstood the opinions of the advocates."⁹ "I do not think our decision should be controlled by *Burr v. Stenton*, 52 Barb. 389, considering

¹ 1 Burr. 143, 145, 146; 1 Kenyon, 436.

² 5 Durn. and E. 384. See also 5 Russ. 248.

³ 2 Sim. 40.

⁴ 1 Dick. 294.

⁵ 1 Dick. 304.

⁶ 2 Atk. 668; 2 Stra. 1060.

⁷ The People v. Corning, 2 N. Y. 15.

⁸ Ingraham, J., *Burke v. Valentine*, 5 Abb. Pra. Rep. 170 N. S.

⁹ Blackburn, J., *Bradlaugh v. De Rin*, 5 Law Rep. 475 C. P.

the reasons given in the opinion in that case at general term, for reversing the special term and considering the special circumstances of that case."¹ *Brown v. Hinchman*,² was not followed in *Terry v. Fargo*,³ because in the former decision a statutory provision was overlooked. In *Benjamin v. Benjamin*,⁴ decided in 1851, the court overlooked a statute passed in 1849, and decided contrary to the statute, so far as the statute applied to the case. For which reason the New York Court of Common Pleas refused to be bound by that decision.⁵ And *Clarke v. Pinney*⁶ was rejected as authority,⁷ because "decided on a wrong principle." Chief Justice Comstock, in *Church v. Brown*,⁸ admitted that the decision, in *Brewster v. Silence*,⁹ followed in *Draper v. Snow*,¹⁰ was erroneous.¹¹ In *Strange's Reports* we find such comments as these: "It was only Mr. J. Wright who said this, and see *The King v. Inhabitants of Bishop*, *vide, contra*. . . . It was only Mr. J. Chapple, and he was wrong, for the act expressly requires," &c.]

Circumstances may sometimes render a case in the House of Lords to be not of much weight. Thus, *Peacock v. Spooner*¹² "has undergone considerable observation," the judges, whose opinions were taken by the house, being six against two, "so that it was a judgment, contrary to the opinion of a great majority of the judges:" it was a determination, "with great variety of opinion among the judges, and no peer in

¹ *Clarkson v. Skidmore*, 2 Lans. 242.

² 9 Johns. 75.

³ 10 Johns. 114.

⁴ 5 N. Y. 383.

⁵ *Romaine v. Kinsheimer*, 2 Hilton, 521.

⁶ 5 Cow. 581.

⁷ 5 Wend. 393.

⁸ 21 N. Y. 315.

⁹ 8 N. Y. 207.

¹⁰ 20 N. Y. 331.

¹¹ *Speyers v. Lambert*, 1 Swe. 344.

¹² 2 Vern. 43, 195, 2 Freem. 114.

the house was of the profession of the law : ”¹ “ it has always appeared to all judges as a very strong determination.”² In *St. John v. The Bishop of Winchester*, the Court of Common Pleas, “ after a week’s consideration,” made a unanimous decision, and on a writ of error the Court of King’s Bench unanimously reversed it. Upon which reversal, a writ of error was brought in Parliament, when Smythe, C. B., concurred with the Court of King’s Bench, and the other barons with the Court of Common Pleas, which latter opinion (of the Court of Common Pleas) was also strongly supported in argument by Lord Apsley, chancellor, and Lord Camden, the only law lords in the house. However, the question was carried without a division, to affirm the judgment of the Court of King’s Bench. A day or two after which a motion was made to re-hear the cause, it being alleged that the majority of the lords present were clearly for reversing that judgment, though by a surprise, they did not divide the house. But the fact being not clearly ascertained, and also for the danger of such a precedent, the motion was withdrawn by consent.³ On this case the Court of Common Pleas, composed of different judges, has observed, that, by reason of the circumstances detailed, “ the authority of that case was not of much weight.”⁴ Lord Loughborough, speaking of a decision by the House of Lords, expresses an opinion that it was not entitled to much consideration, because “ upon the journals of the House of Lords it appears, no one was present upon that occasion, who could know much of the matter : it was not determined by lawyers ; and Lord

¹ 2 Ves. Sen. 237, 660 ; 1 Madd. 483, 484.

² 2 Eden, 204.

³ 2 W. Bl. 930, 933, Cowp. 94 ;

Hill v. St. John, S. C., 3 Bro. P. C., ed. Toml. 375.

⁴ 3 Taunt. 324.

Harcourt speaks of it certainly as not such a decision as he would follow; and one or two other judges have not treated it with much respect.”¹ Also, Sir R. P. Arden, on citing *Savage v. Humble*, decided by the House of Lords,² and mentioning particular facts in the case, observed,—“If these were the grounds, on which the House of Lords proceeded, I must dissent from their judgment;” and he added, “There was no lawyer at that time in the house (unless perhaps Lord Somers), and the case was much embarrassed by circumstances.”³

¹ 5 Ves. 565.

² 3 Bro. P. C., ed. Toml. 5; Hum-

ble *v.* Bill, S. C., 2 Vern. 444; cited
2 P. W. 148, and 17 Ves. 160, 161.

³ 4 Bro. C. C. 137.

CHAPTER XIX.

OF CERTAIN DUTIES OF A JUDGE, OR COURT.

MANY duties of a judge, or court, have already been generally, or in particular, mentioned. Some that were named in the introductory chapter, and remain for a separate notice, are the following duties relative to a suit:—the duties, namely, to hear the arguments of counsel; to contend with difficulties presented by the subject of the suit, or by authorities; to deliberate with a single and unbiassed mind on the judgment to be given; to look forward to the consequences of the judgment contemplated. These duties are comprehended in the subjects of the different sections of the present chapter. Difficulty, it is observable, is a chief occasion of most of the same duties: difficulty, generally speaking, springing from want of information, from discordancy of authorities, or from incorrectness or discordancy of reports. Difficulty, besides, often attends the interpretation of an instrument, and, especially, of Wills.

[Further, as to the duties of a judge, we refer to Appendix II. One source of difficulty may be, want of knowledge in the judge. It has been said¹—"No attorney is bound to know all the law. God forbid that it should be imagined that an attorney, or a counsel, or even a judge, is bound to know all the law." In *Smith v. Chapman*,² Justice Tucker makes

¹ *Montrion v. Jeffries*, 2 Car. and P. 113.

² 1 Hen. and M. 293.

the mistake of attributing, "Reports *tempore* Finch," to Lord Nottingham. Another source of difficulty may be, error in judgment on the part of a judge; and when that occurs, Lord Brougham says,¹—"No judge ought to be ashamed, after erring in judgment, to acknowledge his error. Still less has a court, any reason, for so unseemly a reluctance, to admit that the dispensers of justice are subject to the common lot of humanity." Perhaps the most glaring instance of bad logic is found in the opinion, in *Wilson v. The State of Wisconsin*,² in which Crawford, J., says,— "Suppose we adopt a syllogistic system of reasoning on this subject, thus:—

["A felony is an offence punishable by imprisonment in the State prison ;

["But the crime of adultery is punishable by imprisonment in the State prison ;

["Therefore, adultery is a felony. This syllogism is correctly framed, if the first proposition be true in law, as stated and urged upon us, and yet the conclusion is notoriously incorrect." Of course, the learned judge errs in declaring the syllogism to be correctly framed ; the middle term is undistributed, and it is as valid reasoning as it would be to say,—

[Vegetables grow ;

[Animals grow ;

[Therefore, animals are vegetables.

[To have rendered Justice Crawford's syllogism a valid one, his *major premise* should have been,—All offences punishable by imprisonment in the State prison are felonies. Another instance of a judge resorting to a syllogism is, where Chief Baron Manwood proceeds to show that corporations have no souls,

¹ *Ex-parte*, Cottle, 14 Jurist, 655.

² 1 Smith's (Wis.) R. 191.

which is thus stated :¹—"The opinion of Manwood, Ch. B., was this, as touching corporations: that they were invisible, immortal, and that they had no soul, and therefore no subpœna lieth against them, because they have no conscience nor soul. A corporation is a body aggregate—none can create souls but God; but the king creates them, and therefore they have no souls." The readiness with which judges acknowledge any error into which they may chance to fall, is a very pleasing characteristic. *Melius est recurrere quam mali currere*, said Lord Ellesmere; and Lord Hardwicke, in *Walmsby v. Booth*,² very nobly said,—“Upon this case being re-argued and reconsidered, I am thoroughly convinced that my former decree was wrong;” and in another case, the same learned judge said,—“These are the reasons which incline me to alter my opinion, and I am not ashamed of doing it, for I always thought it a much greater reproach to a judge to continue in his error than to retract it;”³ and Lord Eldon, in *Ex-parte Nott*,⁴ less pointedly admits his error, as thus :—“I feel bound to add, with respect to the case of *Ex-parte Wylie*, which has been so repeatedly appealed to during the argument, that as the first duty of a judge is to endeavor, in the case before him, to decide rightly, and that his next is, if in any future case of the like kind he has any reason to apprehend that his judgment was not upon such sound principles as it appeared to be when he pronounced it, that he should not hesitate to rectify his error. Looking at both these obligations, I feel myself bound to state that I must, when I decided that case, have seen it in a point of view in which, after

¹ 2 Bulstrode, 233.

² 2 Atk. 438.

³ 2 Atk. 27.

⁴ 2 Glyn and J. 308.

most laborious consideration, I cannot see it now." Every overruled case is an instance of judicial error, and the instances are too numerous to detail. A remarkable error was made, in *Briggs v. Davis*.¹ Good judges are always ready to overrule their own decisions when the necessity is clear.² A modern instance is, *Monell, J., in Bretz v. Mayor of New York*.³ "It is curious," says Vice Chancellor Turner, in *Crosse v. Lawrence*,⁴ "that in an unreported case, of *Curry v. Vine*, Lord Cottenham, when at the rolls, decided exactly the other way from what he ultimately decided, in *De Visme v. De Visme*."⁵]

SECT. I. Of certain Facts illustrative of Difficulty.

- II. Of Difficulty in interpreting Instruments.
- III. Of gaining Information from an Officer of a Court; from Civilians; and from Merchants.
- IV. Of learning the whole Truth of a Case reported.
- V. Of hearing Arguments of Counsel.
- VI. Of obtaining the Opinion of another Judge, or Court.
- VII. Of avoiding Bias.
- VIII. Of postponing the Delivery of Judgment.
- IX. Of looking forward to the Consequences of a Judgment.

SECTION I.

OF CERTAIN FACTS ILLUSTRATIVE OF DIFFICULTY.

SOME idea of the frequency of difficulties, and of the magnitude of many of them, may be gathered from the following facts:—

¹ 20 N. Y. 16; corrected 21 N. Y. 574.

² *Re Welman*, 20 Verm. 653; *The State v. Nat*, 13 Ire. 154; *The Louisa*

Bertha, 14 Jur. 1007; *Van Doren v. Mayor of New York*, 9 Paige, 389.

³ 4 Abb. Pra. Rep. 258 N. S.

⁴ 16 Jur. 142.

⁵ 1 Mac. and G. 336; 13 Jur. 1037.

1. Instances, in which a judge has entertained doubts on a question, are too common to bear enumeration. Lord Eldon had doubts upon a will for twenty years.¹ And on Lord Eldon's doubts, Richards, C. B., has made this observation,—“Very long experience in the Court of Chancery has taught me the value of the Lord Chancellor's doubts on all occasions.”²

2. A judge's opinion has been changed, “after mature consideration;”³ a change, which is not unfrequent.⁴ In a case on a will, Sir R. P. Arden changed his opinion more than once,—“I think the case so very doubtful, that I must consider farther. I have changed my opinion more than once.”⁵

3. Very generally, authorities are conflicting. Sometimes, two cases are “in direct opposition to each other,”⁶ “directly contradictory;”⁷ and often many authorities are hardly, if at all, reconcilable,⁸ or are, in some degree, contradictory.⁹ [In *Cardwell v. Hicks*,¹⁰ the court did not agree, as to the effect of a decision of the Court of Appeals; and see *Downing v. Marshall*, 23 How. Pra. Rep. 20.]

4. Expressions of difficulty, caused by the state of authorities, or by some other circumstance, are frequent on the bench.¹¹ These, or the like,¹² expressions

¹ Earl of Radnor *v.* Shafto, 11 Ves. 453.

² 10 Price, 111.

³ 1 Lord Raym. 516.

⁴ *Spencer v. Bullock*, 2 Ves. Jun. 689; *Stenhonse v. Mitchell*, 11 Ves. 352; *Ex-parte Nolte*, 2 Glyn and J. 307, 308.

⁵ *Milsom v. Awdry*, 5 Ves. 466.

⁶ 1 Ves. Jun. 495; *Cas. T. Talb.* 128.

⁷ 3 Bro. C. C. 597.

⁸ 3 Barn. and Adol. 418; 3 Ves. 95; 6 Ves. 332; 1 Ves. and B. 491, 492; 1 Russ. 404; 1 Younge, 77.

⁹ 1 Sim. and St. 177.

¹⁰ 37 Barb. 458.

¹¹ *Cowp.* 718; 2 H. Bl. 501; 3 Bing. 647, 651; 2 Russ. and M. 135; 1 Sim. and St. 177.

¹² 16 East, 235; 4 Barn. and Adol. 220, 222, 223; 6 Ves. 332; 1 Sim. and St. 177.

are of repeated occurrence:—"The decisions run very near to each other, and are hardly reconcilable:"¹ "It is impossible to reconcile the authorities, or range them under one sensible, plain, general rule:"² "The authorities stand so well ranged, that the court would not appear to act too boldly, which ever side of the proposition they should adopt:"³ "I have had great difficulty. I confess that I cannot reconcile the opinion I have formed with all the authorities on the subject, which are to be found in the books; nor can I reconcile those authorities with one another:"⁴ "I find it impossible to reconcile the various decisions. . . . To go through each case, and to extract the principle from it, would be a work of some difficulty, if not impossibility:"⁵ "I have looked through the case of *M. v. W.*, and all the cases to which, in delivering that judgment, my attention was drawn; a judgment which was the result of a very anxious endeavor to examine every authority upon the subject; and with all these cases I find myself under circumstances very trying to a judge; as the task of deducing from them what is the true principle, is greater than I have abilities well to execute."⁶

Some practical remarks relative to conflicting and other cases may properly, it may be considered, be here introduced.

When in a present case "there are authorities both ways," as the precedents are not uniform, it may be a duty to consider the present case according to some general rule. Thus, in a cause where the question was, "whether, when an administration is granted to

¹ 3 Barn. and Adol. 418.

⁶ 1 Younge, 77.

² 3 Ves. 95.

⁵ By Lord Eldon, 1 Ves. and B.

³ *Ibid*, 98.

491. See also 492.

⁴ 1 Russ. 404.

two, and one dies, the administration shall cease and be void, or whether it shall survive to the other who is still living," Lord Talbot observed,—“There are authorities both ways in the present case, viz., that of *A. v. B.*, where it was held by the Lord Cowper, that an administration would survive; and that of *B. v. B.*, where the contrary was determined in the Ecclesiastical Court. As therefore the precedents are not uniform, we must consider this case according to the general rules of survivorship; which seem to be pretty much the same both by the common and civil law.”¹ So in a modern case it is said by Alexander, C. B.:—“I find it impossible to reconcile the various decisions. The safer course, therefore, is, to follow what has been laid down as a clear general rule, than to attend to each particular case. To go through each case, and to extract the principle from it, would be a work of some difficulty, if not impossibility; whilst the present case, as it appears to me, may easily be decided on the plain general ground.”²

Sometimes when it is required to extract a principle from cases difficult to be reconciled, it is hardly practicable to discover it.³ Where there exists a known principle, it is, under many circumstances, the most fit ground of decision. The following opinions delivered on the bench are express to this purpose:⁴—“Without minutely examining all the cases, or saying whether I do or do not agree with them, it is sufficient for me to abide by the principle established by them; the principle is the thing which we are to extract from cases, and to apply it in the decision of other cases:”⁵

¹ Cas. T. Talb. 127, 128.

² 1 Younge, 77.

³ 1 Ves. and B. 491, 492.

⁴ See also 2 Brod. and B. 581.

⁵ By Lord Kenyon, 7 Durn. and E.

148.

“With respect to the cases which have been cited, it is to be observed, that when a general principle for the construction of an instrument is once laid down, the Court will not be restrained from making their own application of that principle, because there are cases in which it may have been applied in a different manner. The principle being once acknowledged, the only difficulty consists in making the most accurate application of it :”¹ “There are great authorities and opinions both ways, and we are therefore at liberty to decide upon principles :”² “When this appeal was argued, I thought the question depended so much upon the general doctrine of legal and equitable assets, that I desired time to look into the cases, to see what general rules had been established upon that subject; for all doubtful points are decided by an application of general principles to the particular case :”³ If authority be doubtful, we must recur to principles :”⁴ “It must be admitted, that the two cases of *H. v. G.*, and *R. v. D.*, cannot be reconciled; and between the conflicting opinions of Lord Hardwicke, recourse must be had to principle and analogy.”⁵

A case, which is the ground of a decision, sometimes makes this decision consistent with other authorities. Accordingly, Lawrence, J., concurring in the decision of the rest of the court, says,—“The only case, that at first weighed with me against this decision, is that in 2 Modern; but the case in the Year Books, on which that case proceeded, explains it, and makes it consistent with all the other authorities.”⁶

5. A common wish of a judge is, that a case be de-

¹ By Lord Eldon, 2 Bos. and P. 24.

⁴ By Best, J. 2 Brod. and B., 505.

² By Heath, J. 2 Bos. and P. 374.

⁵ By Sir J. Leach, 5 Madd. 410.

³ By Lord Camden, 1 Bro. C. C.

⁶ 6 Durn. and E. 487.

cided in the House of Lords.¹ And he often puts it into the course to go to the House of Lords.² In a case on a will, and in which Lord Eldon affirmed a decree of Lord Rosslyn, Lord Eldon concluded his judgment by saying,—“Upon the whole, it is better for me to affirm the decree; not, as being satisfied with the principle of it, but, as I cannot make a decree, with which I should be better satisfied. That will put it into the course to go to the House of Lords; where the opinion of the twelve judges may be taken upon the construction of the will.”³ A case of great difficulty was, *Giles v. Grover*, and in this case in the Exchequer Chamber, Abbott, C. J., said,—“The question in this case is one which has agitated the Courts of Westminster Hall for a great many years; it is a question as to the priority of an extent at the suit of the crown over an execution at the suit of a subject, the extent not having been tested until the sheriff had taken possession under the *fieri facias* upon the subject’s execution. Upon this question there has been a difference of opinion in the courts of Westminster Hall; the Court of King’s Bench in one case, and the Court of Common Pleas in two cases, having decided that the extent, under such circumstances, was not entitled to priority over an execution at the suit of a subject, The Court of Exchequer has uniformly decided the other way, viz., that the extent was entitled to priority; and one of these decisions is, in point of fact, later than those of the other courts. The question therefore becomes one of great difficulty, and your lordship will not be surprised to hear that the Lord Chief Justice of the Common Pleas and myself, having heard the

¹ 1 Eden, 414; 1 Russ. and M. 276, 483. See also 2 Jac. and W. 450–452 and 2 Swanst. 470.

² *Beard v. Westcott*, 1 Turn. and R. 25. See 2 Jac. and W. 450.

³ *Stuart v. Marquis of Bute*, 11 Ves.

case argued, and considered it very maturely, have not been able to come to a decision upon the subject, and to agree as to what advice we should offer to your lordship. Having therefore communicated the result of our deliberations, it remains for the court to dispose of the case as it may think proper." Lord Lyndhurst then said,—“Under the circumstances of this case, there having been this difference of opinion between the courts of King’s Bench, and Common Pleas, and Exchequer, and the two learned Chief Justices not being able to agree in any decision upon the question, although I have an opinion upon the subject, the best and most proper course, in my judgment, to dispose of it, in order that it may be formally decided by the court of the last resort, will be to affirm the judgment, that there may be an appeal to the House of Lords.”¹

6. Different judgments, or opinions, delivered in the same cause by judges of the same court, or of different courts, or in the same cause by different courts, and the frequency of these opposing judgments, or opinions, are conclusive proof of great difficulty, with which the judges have often to contend in constructing their judgments. Judges’ difference of opinion may be,—on the power of modern practice, as of pleading, to alter the law contained in ancient authorities:² on the point, whether a particular question is now open to argument; “whether it be too late to consider that question, or not:”³ on the weight of a particular *dictum*:⁴ on the application of a maxim:⁵ on the meaning and ap-

¹ 1 Younge and J., 248.

² Read v. Brookman; 3 Durn. and E. 151.

³ Good v. Elliott, 3 Durn. and E. 693, 697, 702.

⁴ Steel v. Houghton, 1 H. Bl. 53, 54, 59, 63; Brisbane v. Dacres, 5 Taunt. 153, 159, 162—4 Bligh’s New Rep. 243.

⁵ 5 Taunt. 160, 162.

plication of a maxim :¹ on the value of a decision :² on the question whether a case cited is distinguishable from the present case, or is an express, or a "most positive decision," or a "direct decision upon the point :"³ on the existence of a common law right : in other words, and the question, whether the common law sustains a particular right claimed :⁴ on the intention in a will :⁵ on the intention in a deed as a lease :⁶ on the validity of a particular lease made under a power :⁷ on the question, whether a particular will can be deemed to be an execution of a power :⁸ on the force, which the law may cede to the express agreement of parties to an instrument as a bond :⁹ on the point, whether the particular case is distinguishable from a former decided case.¹⁰

In instances too numerous to be here enrolled, one dissentient voice has accompanied a judgment which a court has delivered. Often a court composed of four judges, has been in opinion equally divided.¹¹

Some singular differences of opinion are found ; as particularly—in two cases on the interpretation of different wills :¹² in a case, where, on a motion for a

¹ *Deane v. Clayton*, 7 Taunt. 498, 499, 507, 520, 521, 522, 529, 534.

² 5 Taunt. 157, 158, 163.

³ *Ibid.*

⁴ *Steel v. Houghton*, 1 H. Bl. 52–63 ; *Blundell v. Catterall*, 5 Barn. and Ald. 274–316.

⁵ *Denn v. Mellor, or Moor*, 5 Durn. and E. 558, 6 Durn. and E. 175, 1 Bos. and P. 558, 3 Anstr. 781.

⁶ *Clifton v. Gerrard*, 1 Bos. and P. 522, 7 Durn. and E. 676.

⁷ *Doe v. Smith*, 5 Maule and S. 467, 1 Brod. and B. 97, 2 Brod. and B. 473.

⁸ *Doe, or Denn, v. Roake*, 2 Bing. 497, 10 Moore, 113, 5 Barn. and Cr. 720, 8 Dowl. and Ryl. 514.

⁹ *Cage v. Acton*, 1 Lord Raym. 515, 12 Mod. 288, 1 Salk. 325 ; cited 5 Durn. and E. 384–387.

¹⁰ *The King v. Ossett-cum-Gawthorpe*, 4 Barn. and Adol. 222, 223, 1 Nev. and Man. 21.

¹¹ *Griffith v. Harrison*, 4 Durn. and E. 737 ; *Laugher v. Pointer*, 5 Barn. and Cr. 547, 8 Dowl. and Ryl. 556 ; *Norman v. Booth*, 10 Barn. and Cr. 703 ; *Deane v. Clayton*, 7 Taunt. 489, 1 Moore, 203, cited 4 Bing. 642, 643, 645 ; *Scales v. Jacob*, 3 Bing. 638, 11 Moore, 553 ; *Strother v. Barr*, 5 Bing. 136, 2 Moore and P. 207.

¹² *Philips v. Philips*, 1 P. W. 40 ; *Doe v. Perratt*, 10 Bing. 198.

new trial, the twelve judges were equally divided, the division being, for a new trial, two judges of each court, and against it, two judges of each court:¹ in cases, where several judges have concurred in an opinion contrary to the opinion of another judge, and have differed from one another in the reasons of the opinion, in which they concurred:² and in a case, where, on a writ of error from the Common Pleas, the judgment there given was affirmed in the King's Bench, but the judgment of this court was, on the motion of Lord Thurlow, reversed in the House of Lords, the division being nineteen against eighteen lords.³ [Bradwell v. Weeks,⁴ was reversed by the casting vote of the Lieutenant Governor, all the *law* members of the court voting for affirmance.⁵]

Instances of different judgments of judges of the same court, are found in, besides the cases of different judgments before referred to, the cases here named in the margin.⁶ And in addition to such instances of different judgments of judges of the same court, the reader may here be referred to several instances—of different judgments of judges of different courts:⁷ of different judgments of two courts of law, which, on a case sent to each of them from the Court of Chancery, have returned conflicting certificates:⁸ of different

¹ Rex v. Bennett, 1 Stra. 105.

² Ashby v. White, 2 Lord Raym. 938, 950; 6 Mod. 50; Ratcliffe's case, 1 Stra. 267, 268.

³ Bishop of London v. Ffytche, 1 East, 496, Cunningham's Law of Simony, 52,

⁴ 1 Johns. Ch. 206.

⁵ 13 Johns. 1.

⁶ Regina v. Paty, 2 Lord Raym. 1105; Millar v. Taylor, 4 Burr. 2303, 2395; Pasley v. Freeman, 3 Durn. and E. 51; Goodtitle v. Otway, 1 Bos.

and P. 576; Beale v. Thompson, 3 Bos. and P. 405; Houghton v. Matthews, *Ibid*, 485; Nurse v. Craig, 2 Bos. and P. New Rep. 148.

⁷ Doe v. Child, 1 Bos. and P. New Rep. 335; Driver v. Frank, 8 Taunt. 468, 2 Moore, 519, 6 Price, 41; Giles v. Grover, 1 Younge and J. 232; 9 Bing. 128, 2 Moore and S. 197; Garland v. Carlisle, 2 Crompt. and M. 31.

⁸ Beard v. Westcott, 5 Taunt. 393, 5 Barn. and Ald. 801, 1 Turn. and R.

judgments of two courts of law, on a case in error:¹ of different judgments in a cause in equity re-heard² of different judgments on appeal to the Lord Chancellor from the Master of the Rolls,³ or Vice-Chancellor:⁴ and of different judgments of the House of Lords, and a court of law,⁵ or equity.⁶

[Judges differ, but usually they differ with great respect for the opinions of each other. Now and then, however, even the judicial mind, it would seem, chafes at legal dogmas as advanced by other judges. Else how can we explain the style in which the House of Lords overruled the Court of Exchequer Chamber, in *Taylor v. The Chichester Railway Company*. In the court of first instance, Lord Chief Baron Pollock, and Barons Martin, Bramwell, and Pigott, gave judgment unanimously in favor of the plaintiff. On appeal the

25. And see *Gore v. Gore*, 2 P. W. 28, 64, 65,

¹ *St. John v. Bishop of Winchester*, 2 W. Bl. 930, Cowp. 94; *Denn v. Mellor*, 5 Durn. and E. 558; *Doe v. Moore*, S. C., 6 Durn. and E. 175; *Denn v. Moore*, S. C., 1 Bos. and P. 558, 3 Anstr. 781; *Clifton v. Gerrard*, 1 Bos. and P. 522, 7 Durn. and E. 676; *Doe v. Smith*, 5 Maule and S. 467, 1 Brod. and B. 97, 3 Moore, 339; *Doe v. Roake*, 2 Bing. 497; *Denn v. Roake*, S. C., 5 Barn. and Cr. 720, 8 Dowl. and Ryl. 514; *Rennell v. Bishop of Lincoln*, 3 Bing. 223, 11 Moore, 139, 7 Barn. and Cr. 113, 9 Dowl. and Ryl. 810; *Balme v. Hutton*, 2 Crompt. and J. 19, 1 Crompt. and M. 262.

² *Philips v. Philips*, 1 P. W. 34, 41; *Luders v. Anstey*, 4 Ves. 501, 5 Ves. 213.

³ *Philips v. Philips*, 1 P. W. 40; *Hervey v. Aston*, 1 West's Cas. T. Hardw. 379, 414, 437, 1 Atk. 361,

Cas. T. Talb. 212; *Bromley v. Holland*, 5 Ves. 610, 7 Ves. 3; *Mills v. Farmer*, 1 Meriv. 55.

⁴ *Turner v. Harvey*, Jacob, 169.

⁵ *Ashby v. White*, 2 Lord Raym. 938, 958, 6 Mod. 45, 1 Salk. 19; *Denn v. Moore*, 1 Bos. and P. 558, 2 Bos. and P. 247; *Bishop of London v. Ffytche*, 1 East, 487, 496, *Cunningham's Law of Simony*, 52; *Doe v. Jesson*, 5 Maule and S. 95, 2 Bligh, 1; *Doe v. Smith*, 1 Brod. and B. 97, 3 Moore, 339, 2 Brod. and B. 473, 5 Moore, 332; *Rowe v. Young*, 2 Brod. and B. 165; *Rennell v. Bishop of Lincoln*, 7 Barn. and Cr. 113, 9 Dowl. and Ryl. 810; *Mirehouse v. Rennell*, S. C., 8 Bing. 490, 1 Moore and S. 683; *Fletcher v. Lord Sondes*, 3 Bing. 501,

⁶ *De Gols v. Ward*, *Cas. T. Talb.* 243; *Lord Beaulieu v. Lord Cardigan*. *Ambl.* 533, 3 Bro. P. C., ed. Toml. 277, cited 5 Ves. 483.

Court of Exchequer Chamber reversed this decision. The majority consisted of Justices Keating, Mellor, Montague Smith, and Lush; Justices Willes and Blackburn dissented.¹ The Lord Chancellor said: "Can any one conceive such a contest as that being raised? . . . Would such a contract ever be suggested or dreamt of? . . . I need not dwell upon the plain and obvious reasoning, which is consonant in every way with good sense with regard to contracts. Nobody ever heard of a contract being a one-sided one. . . . I confess I have endeavored to follow the judgment of the learned judges in the Court of Exchequer Chamber, from whom I have the misfortune to differ in this case. I cannot see any force in the reason which they there allege." Lord Westbury expressed his dissent from the judges in the court below. After stating the propositions put forward by the respondents, and sanctioned by that court, his lordship says: "The whole thing is mere imagination about the agreement being *ultra vires*, and about the company committing a breach of trust. It proceeds only from a want of more accurately understanding the meaning of terms, and the rules by which they are applied. Then to that must be added another extraordinary illusion." Then, after speaking of an argument drawn from the ultimate destination of certain money payable by the respondents, he says, "That is an utter confusion with respect to the provisions," and again, "This is only another instance of misconception of the nature of the provisions applicable to this subject," and his lordship finishes thus: "I regret that Sir C. Taylor has been put to the necessity of coming here to correct this misapprehension. The

¹ 36 Law J. Rep., N. S., Exch., 201.

case is an extremely clear one, and I am clearly of opinion that the judgment of the Court of Exchequer Chamber must be reversed."

["My brother Willes entertains some doubt on the case, and but for the high authority of Parke, B., and the decisions, *Glover v. Dixon*, and *Webber v. Sparkes*, would have thought that this case might have been otherwise decided. Were it not for the doubt of my brother Willes, I must say, speaking for myself, that this case would be entirely free from doubt."¹

[In *Regina v. Bird*,² was this remarkable difference of opinion. Campbell, C. J., "It is utterly impossible to commit the crime of murder without an assault." Maule, J., "Murder can be committed without an assault." Alderson, B., "Murder does not include an assault necessarily."]

SECTION II.

OF DIFFICULTY IN INTERPRETING INSTRUMENTS.

SUBJECTS of a suit which frequently occasion difficulty are, instruments of which an interpretation is required; as a lease,³ lease under a power,⁴ conveyance,⁵ settlement,⁶ bond or agreement on marriage.⁷ But an

¹ Kelly, C. B., *Huddart v. Rigby*, 5 Law Rep. 143 Q. B.

² 5 Cox, C. C. 20; 15 Jur. 193; 20 Law J. R., N. S., 70 M. C.

³ *Love v. Pares*, 13 East, 80.

⁴ *Doe dem. Earl of Jersey v. Smith*, 1 Brod. and B. 97, 2 Brod. and B. 473, 3 Moore, 339, 5 Moore, 332.

⁵ *Earl of Cardigan v. Armitage*, 2

Barn. and Cr. 197, 3 Dowl. and Ryl. 414.

⁶ *Marquis Cholmondeley v. Lord Clinton*, 2 Meriv. 171, 2 Barn. and Ald. 625, 2 Jac. and W. 1.

⁷ *Prebble v. Boghurst*, 1 Swanst. 309, 1 Wils. 155; *Frank v. Martin*, 1 Eden, 309.

instrument, which is the most common subject of a suit, and which, when required to be construed, causes the most considerable difficulty, is, a will.

Lord Henley, giving judgment in the Court of Chancery, makes an observation, remarkable as much for its truth, as for its severity:—"It is the fate of all courts of justice upon wills, it is the peculiar destiny of this court in contracts, wills, and trusts, to be the authorized interpreters of nonsense, and to find the meaning of persons that had no meaning at all,

ex fumo dare lucem,

———*ut speciosa dehinc miracula promat.*

A creative power is required to bring light out of darkness, and sound or specious determinations from unintelligible instruments." ¹

The interpretation of a will is governed by certain general rules. The chief of these rules are contained in the following passage, in which several of them are collected, and in few words expressed, by Sir R. P. Arden. This learned judge states:—"The intention is to be collected from the whole will taken together. Every word is to have its effect. Every word is to be taken according to the natural and common import; and if words of art are used, they are to be construed according to the technical sense, unless upon the whole will it is plain the testator did not so intend. The court are bound to carry the will into effect, provided it is consistent with the rules of law. Another rule must be added; that if the court can see a general intention consistent with the rules of law, but the testator has attempted to carry that into effect in a way that is not permitted, the court is to give effect

¹ 2 Eden, 4.

to the general intention, though the particular mode shall fail.”¹

The following facts supply ample proof of difficulty in construing wills:—

It is not uncommon to hear it said on the bench, that a will is an extraordinary will;² or a very dark and intricate will;³ or that it is inaccurately penned;⁴ or is oddly expressed;⁵ or very oddly worded;⁶ or is penned in an obscure and blundering manner.⁷

The wills, on which the bench made the following remarks, strong as those remarks are, are by no means solitary instances of the difficulties, which encompass the interpretation of wills:—“The will, upon which this suit arises, is almost incomprehensible, and perfectly inconsistent with itself.”⁸ “This is one of the most difficult questions that can occur; the construction of words, to which it is hardly possible to give any construction, which will not involve something like absurdity; and it is impossible to put any construction upon them, which will not under certain circumstances be contrary to the testator’s intention.”⁹ “I have, in the best manner I could, considered the will; but, of all the wills ever under my consideration, it is in many parts the most inconsistent, repugnant, and the most difficult to make common sense of, that I ever met with, all the questions being occasioned by the strange inconsistent penning.”¹⁰ “The testator, holding the will in his hand, stated what in his judgment was its effect; not indeed with any great accuracy, for, to do justice to the testator, it was out of the

¹ 4 Ves. 329.

² 4 Ves. 847.

³ 1 Ves. Sen. 22.

⁴ 1 Atk. 437.

⁵ 1 Ves. Sen. 168.

⁶ 5 Ves. 308.

⁷ 1 Ves. Sen. 170.

⁸ 5 Ves. 246.

⁹ 5 Ves. 466.

¹⁰ 2 Ves. Sen. 278.

power of any man living or dead, to state accurately what was the effect of the will:"¹ "In this case the attention of the court has been directed to a will, perhaps the most confused in its terms and provisions of any ever submitted for judicial decision. It consists of unfinished sentences; of words put together without regard to grammar or the ordinary rules of language; and of bequests and dispositions, which appear so contradictory and unintelligible, as to render it almost impossible to put upon it any reasonable or consistent construction."²

A striking illustration of difficulty of this kind accompanies the following observations, which occur in a judgment given by Lord Kenyon: "After an anxious endeavor," says that learned lord, "to discover the intention of a testator, it frequently happens that we can only conjecture what his intention was; and sometimes there is scarcely enough to form even a conjecture. Formerly, Sir J. B. made his own will; and at the close of it he said, that he had disposed of his estate in so clear a manner, that he thought it impossible for any lawyer to doubt about it. This will was afterward contested; and it came before Lord Hardwicke, who said, that he was so utterly at a loss to conceive what was the real intention of the testator, that he wished he could find some ground on which to form a conjecture. So in the case of *R. v. S.*, Lord Mansfield, whose mind was as equal to the explanation of difficult points, as that of any lawyer who ever sat in Westminster Hall, admitted the difficulty of deciding questions of this kind."³

In several instances, a disposition in a will has

¹ 1 Turn. and R. 69.

² 8 Durn. and E. 502.

³ 5 Russ. 136.

been so deeply involved in obscurity, that the court has been wholly unable to discover the testator's meaning. And the disposition has, in consequence, been void for uncertainty. In cases, where this has happened, the court has said,—“This case has stood over longer than we should have permitted, in hopes that upon consideration we might be able to put a construction upon the will, consistent with some probable intention of the testator. But after very full and repeated consideration, we are not able, with any rational certainty, to discover what he meant:”¹ “The case is one of considerable difficulty, created chiefly by the very singular language of the will. The will is that of a person far advanced in years; and it would perhaps be impossible to find a more senseless and absurd collection of words, than occurs in that part of it, which relates to the legacy in question.”² On the same ground of uncertainty, the whole of a will is sometimes void;³ as in a case, where the court observed,—“This instrument presents ambiguity of every kind; uncertainty both in the subject and in the objects of the bequest; who are to take, and what is to be taken. The court cannot insert or transpose words, for the purpose of giving a meaning to instruments, which have none.”⁴

An important matter, relative to the interpretation of wills, remains to be mentioned. This is, the inquiry which, in most instances, it is needful to make, whether the interpretation, already put on another will, binds the court to a particular construction.⁵

¹ Doe v. Joinville, 3 East, 175.

1 Keb. 719; Mason v. Robinson, 2 Sim. and St. 295.

² Attorney General v. Sibthorpe, 2 Russ. and M. 115.

⁴ Mohun v. Mohun, 1 Swanst. 201,

³ Bowman v. Milbanke, 1 Lev. 130,

1 J. Wils. 151.

⁵ 1 Stra. 36; 2 Barn. and Adol. 692.

In a suit on a will, the chief guide in its construction is, the testator's intention, the polar star, as it has been called,¹ for the direction of the court. That guide is however subject to a power, which much controls it; namely, the maxim *stare decisis*;² by the force of which, if decision has affixed to certain words, or kinds of disposition, a particular construction, this construction must prevail in the interpretation of a similar will,³ although the effect may be, wholly to defeat the testator's intention.⁴

This doctrine is luminously expressed by Lord Chancellor Cowper in a case, where he had occasion to put it in practice. He there says:—"If the manifest intent of the testator, expounded by natural reason, without regard to legal resolutions, were to govern in this case, I should think it would hardly admit of a question. But since there is an artificial reason in the law, which sometimes stands as opposed to natural (which is right) reason, and is founded upon the opinions and resolutions of judges, and that taken and allowed to be law; the courts both of law and equity ought to submit to them, when they are fully examined and found to be thus settled; because otherwise the law would be an uncertain, undetermined rule, and lawyers would not know how to advise their clients. I shall therefore inquire how far this court [chancery] is hindered in the present case by the fixed rules of law, from pursuing the plain intent of the testator."⁵

On the same subject, it is an observation of Lord Tenterden:—"It sometimes happens, that the lan-

¹ 2 Burr. 1112; 2 East, 42; 1 Madd. 439.

² 8 Durn. and E. 68.

³ 2 Barn. and Adol. 692.

⁴ Cowp. 306, 659; Dougl. 734, 4th ed.; 8 Durn. and E. 502; 1 Turn. and R. 313, 314.

⁵ 1 Stra. 36.

guage of one will is so nearly like that of another, as to make a decision upon the first a plain authority to govern the second; but this does not always happen; and very small changes of language have often led to a difference of interpretation."¹

[It is curious to observe how frequently the wills of eminent lawyers have been the subject of litigation. *Medlycott v. Jortin*² arose out of Serjeant Hill's will; the will of Bradley, a once celebrated conveyancer, was set aside by Lord Thurlow for uncertainty,³ and by the will of a Master in Chancery the proceeds of his estate were directed to be invested in his own name.⁴ The wills of Sir Samuel Romilly and of Chief Baron Thompson gave rise to litigation, as did also the wills of Chief Justice Holt,⁵ Chief Justice Eyre,⁶ Serjeant Maynard,⁷ Vernon, an eminent chancery counsel;⁸ Baron Wood,⁹ Justice Vaughan,¹⁰ Francis Vesey, Junior, the reporter;¹¹ Richard Preston, the conveyancer,¹² and Chief Justice Saunders.¹³ It required the aid of the court to construe the will of an Albany lawyer, Abraham Van Vechten.¹⁴ And the will of Chancellor Kent received one construction in the Supreme Court, and another and different one in the Court of Appeals.¹⁵

¹ 2 Barn. and Adol. 692.

² 2 Brod. and B. 632.

³ Martin's Conveyancer's Recital Book, 35 note.

⁴ Hayes and Jarman's Forms of Wills, 98 note, 7 edit. See 7 Notes of Cases, 377; 2 Robertson's Eccle. Rep. 140; *Bigge v. Bigge*, 9 Jurist, 192.

⁵ Vin Ab. Apportionment.

⁶ G. Cooper, 156.

⁷ *Earl Stamford v. Hobart*, 3 Brown P. C. 156.

⁸ *Acherley v. Vernon*, 1 P. Wms. 783.

⁹ *Baker v. Bayldon*, 31 Beavan, 209.

¹⁰ *Knight v. St. John*, *coram* Wood V. C. (1862.)

¹¹ *Vesey v. Vesey*, *coram* Kindersly V. C. (1862.)

¹² *Whyte v. Preston*, *coram* the Master of the Rolls (1862).

¹³ Reports of Cases in the Law of Real Property, App. 24.

¹⁴ *Van Vechten v. Van Vechten*, 8 Paige, 104.

¹⁵ *Hone v. Kent*, 11 Barb. 315; 6 N. Y. 390.

[The difficulty of interpretation is not confined to wills; it extends to statutes. Mr. Justice Maule, in *Stratton v. Pettit*,¹ referring to an act of parliament, remarked "that it was incongruous and impossible of operation, and its absurdities so great that the framers themselves had no very distinct notion of its meaning." And in *Regina v. Scott*,² Mr. Justice Blackburn observed, with respect to an act passed in 1746:—"The statute, though not drawn in modern times, is somewhat obscure." And Mr. Justice Crompton, in *Baines v. Swainson*,³ referring to a passage in the English Factor's act, said it was impossible to define what was meant, and "it is one of those loose enactments which conveys much difficulty. When you get to these acts of parliament the difficulty is immense."]

SECTION III.

OF GAINING INFORMATION FROM AN OFFICER OF A COURT ; FROM
CIVILIANS ; AND FROM MERCHANTS.

1. A HABIT of the Court of Chancery is, to require information, relative to the practice of the court, from its officers, the masters, the registrar,⁴ the six clerks,⁵ and clerks in court; as,—where, on a question "of a good deal of consequence," Lord Loughborough desired to "talk to some of the masters upon it." and accordingly made inquiry into the practice in the masters' office;⁶ and where Sir J. Leach, to learn the

¹ 16 C. B. 432.

² 4 Best and S. 374.

³ 4 Best and S. 270.

⁴ 1 Sim. and St. 249, 433; 2 Sim.

and St. 226; 2 Sim. 86; 1 Mylne and K. 246.

⁵ 1 Sim. and St. 448.

⁶ 2 Ves. Jun. 718, 719.

practice of the masters upon a particular subject, directed a question thereon to be submitted to them, in reply to which, a certificate was returned, signed by nine of the masters;¹ and instances in which the registrar has furnished the court with cases;² as where Sir J. Leach put off his decision upon a motion, "until he had consulted the registrar," whereupon his honor was furnished by the registrar with two cases on the subject;³ and the further instance, in which the same learned judge referred it to the six clerks to certify, what was the practice on the point in question, and accordingly caused a question as to the practice to be addressed to the six clerks, who thereupon returned their certificate;⁴ and a case where Lord Hardwicke delivered his opinion, "after hearing several of the clerks in court."⁵

2. In a cause on a ransom bill, the court wished the case to be spoken to by civilians, Lord Mansfield saying, "We can have no light from our own law." On a subsequent day, the case was accordingly so argued.⁶ In *Cawthorne v. Chalié*, Sir J. Leach, on a question of taking out letters of administration to J. C., ordered the case to stand over, in order that the opinion of a civilian might be obtained, whether the plaintiff was or was not entitled to procure an administration to the estate of J. C.⁷ And in *Fowler v. Richards*, the same learned judge, on a question relative to representation under probates, directed that the cause should stand over, in order that the opinion of a civilian might be taken, and that inquiry might

¹ 1 Sim. and St. 272, 273.

² 2 Madd. 185.

³ 1 Sim. and St. 274.

⁴ 1 Sim. and St. 120. And see

⁵ 1 West's Cas. T. Hardw. 676.

⁶ *Anthon v. Fisher*, 3 Dougl., ed. Frere and R. 166.

⁷ 2 Sim. and St. 127.

ibid. 448.

be made as to the practice and doctrine of the ecclesiastical courts on the subject.¹ In a further case, a question arising on the admissibility of evidence to explain a testator's meaning with regard to certain legacies, Sir J. Leach inquired,—“What is the rule of the Ecclesiastical Court in these cases?” And his honor proceeded to say,—“On a question as to a legacy, I should think it right to follow the rules, by which they are guided in the reception of evidence. In general, they resort to the rule of the civil law, but not in all cases. If this case would bear the expense, I should have wished to hear it argued by some civilians. Let a case be stated for the opinion of two civilians.” A case was accordingly so stated.²

A case before Lord Hardwicke, “being of a matter of great consequence in trade,” his lordship, after argument at the bar, adjourned the cause to a particular day, and desired the four merchants, who were examined in the cause on the different sides, might attend in court, in order to be consulted by him on the point in the case; and accordingly on that day they attended, namely, two aldermen of London and merchants, and two other merchants, “all of eminence in the mercantile line;” and, after having asked them several questions upon the custom and usage of merchants relating to the matter in doubt, his lordship gave his opinion.³ In an action on a policy of ship-insurance, and where the court ordered the case to stand over for further argument, and it was necessary to understand what is meant by barratry, Lord Mansfield “in the meantime considered of it, and consulted with men conversant in

¹ 5 Russ. 39.

² Hurst v. Beach, 5 Madd. 356.

³ Kruger, or Cruger, v. Wilcox, Ambl. 252, 1 Dick. 269.

mercantile affairs.”¹ And, on a question relative to a bill of exchange, Lord Loughborough took time to consider of it, and afterwards mentioned, he had “talked to one or two persons in trade” upon it.²

[On an argument before one of the circuit courts of the United States, it was held that the opinion of a lawyer not in practice, given in a case other than the one before the court, may be quoted, not as authority, but to assist the judgment of the court.³ In an action tried before Lord Holt, on a wager whether a person playing at backgammon having touched one of his men without moving it, was bound to play it, the judge called in the assistance of the groom porter to decide the controversy.⁴]

SECTION IV.

OF LEARNING THE WHOLE TRUTH OF A CASE REPORTED.

A REPORT of a case very frequently presents some difficulty. It presents a difficulty, when there is reason to doubt, whether the court adjudged on the ground stated in the report;⁵ or it is impossible to say, on what ground the court did proceed.⁶ It clearly also presents a difficulty, when it enables a judge to speak of its inaccuracy, falsity, or other vice, in these, or the like,⁷ terms:—“The printed report must be erroneous:”⁸ “The book there is nonsense:”⁹ “This

¹ Vallejo v. Wheeler, Cowp. 143, 154.

² *Ex-parte* Wackerbarth, 5 Ves. 574.

³ Anon. 1 Wal. Jr. 107.

⁴ Pope v. St. Leger, 1 Salk. 344.

⁵ Ambl. 55, 56.

⁶ *Ibid.* 1 Crompt. and M. 266.

⁷ 1 Bos. and P. 605; 4 Ves. 24, 689; 6 Ves. 640; 8 Ves. 250; 9 Ves. 211; 2 Russ. and M. 115.

⁸ 5 Ves. 85.

⁹ 1 Lord Raym. 522, 12 Mod. 294.

must be a very incorrect report; it is impossible that it can be a true representation of what Lord Chief Justice Holt said;”¹ “I wish to look into the registrar’s book as to that case of *H. v. B.* Every principle is against it. . . . I am entirely discharged of that case of *H. v. B.* It did not occur to me; but I found I had the decree; and it is totally misreported:”² “There is no one case to support this bill, except *G. v. P.*, which is a totally false report:”³ “In cases of this class, considerable confusion had been introduced from the inaccuracy of reporters. . . . No person can read Lord Thurlow’s reported judgment upon this subject, without observing that he is often made to contradict himself:”⁴ “The defendant’s counsel have urged the case of *E. v. P.* I have looked into that case, and think it a very extraordinary one, particularly as the judge sent for the parties to attend him. I can pay no credit to it, nor look upon it as any authority, or any thing more than the dream of some note-taker in this court.”⁵

Proof of the desire of the courts, to learn the whole truth of a case reported, is furnished by the following facts:—

1. The record of a case at law has been inspected.⁶ Chief Justice Holt, being dissatisfied with Lord Coke’s report of a case, sent for the record, to know the judgment which was there given.⁷ In a modern instance; the Court of King’s Bench referred to the record of a case, to know the language of a will there; and, it may be mentioned, that, on looking at the

¹ 1 Burr. 458, 459.

² 5 Ves. 661. See also 664.

³ 4 Ves. 689.

⁴ 5 Madd. 358.

⁵ 2 Eden, 316.

⁶ 2 Lord Raym. 1121. 1 Stra.

209; 2 Maule and S. 518.

⁷ 2 Lord Raym. 982, 6 Mod. 76.

record, it turned out there were words in the will going greatly beyond those contained in the report of the case.¹ Chief Justice Holt expressly says,—“Where a report of a case is doubtful, it ought to be verified by the record.”²

2. The Court of Chancery refers very commonly to the register-book of the registrar of the court;³ and sometimes to his minute-book.⁴ The register-book has likewise been looked into by a judge of a court of law.⁵

3. Inspection is sometimes made of a manuscript note of a case;⁶ or the manuscript notes of the judge, by whom it was decided.⁷ [“*Jackson v. Semes*,⁸ was decided by Lord Eldon, on a supposed recollection of an unreported *dictum* of Lord Thurlow, which (according to the precedent of *Anthony and Cæsar’s will*) he was in the habit of resorting to when at a loss for an authority.”⁹]

4. A brief in a cause is sometimes examined;¹⁰ an examination that was made by Sir R. P. Arden, who had been counsel in the case, “in which he had got his brief, with the notes, he took on the back, of the arguments on the other side.”¹¹

5. A search for the will in a suit has been directed;

¹ 9 Barn. and Cr. 282.

² 2 Lord Raym. 1203.

³ 3 Atk. 713; 3 Ves. 552; 4 Ves. 333, 833; 5 Ves. 501, 503; 19 Ves. 666; 1 Mylne and K. 243; 1 Madd. 464. The register-book often fails to afford the required information, on account of the dismissal of a bill, or some other circumstance. 1 Atk. 378; 2 Ves. Jun. 474; 3 Ves. 467; 4 Ves. 463; 5 Ves. 419, 469, 662, 664; 1 Burr. 481; 1 Durn. and E. 769.

⁴ 4 Ves. 529.

⁵ 1 Burr. 428; 2 Kenyon, 158; 5 Durn. and E. 61; 8 Durn. and E. 266.

⁶ Willes, 166; 3 Bos. and P. 652; 5 Maule and S. 20.

⁷ 8 Ves. 388, 390; 1 Turn. and R. 176.

⁸ 16 Ves. 356.

⁹ 10 Campbell’s *Lives of the Chanc. ch. ccxiii*, p. 251.

¹⁰ 8 Taunt. 55; 5 Ves. 664.

¹¹ 5 Ves. 382.

as by Lord Loughborough, who observed,—“I have had the registrar’s book searched for the case of *G. v. P.*; and as it was suggested by the attorney-general that the will might be taken short in the registrar’s book, I directed a search for the will.”¹

6. Where a case in the House of Lords has been imperfectly and incorrectly reported, information respecting it has been sought by examining the printed cases.²

7. Lord Hardwicke having examined a case in the register-book, and it there looking as if a power had been executed by virtue of a private act of parliament, his lordship sent for the record of the act.³

The present occasion may be taken to notice, that, in the instance of a case, or proposition, introduced into an abridgment, or digest, it is common to turn to the report out of which it purports to be extracted;⁴ a species of care that is often necessary to avoid being misled;⁵ since it has happened that the case in the report did not warrant the position in the abridgment,⁶ or digest,⁷ and, in one example, that the report was directly opposite to the abridgment.⁸

Sir E. Coke constantly offers the advice, “to use abridgments as tables, and to trust only to the books at large.”⁹ “I hold him,” he says, “not discreet, that will *sectari rivulos*, when he may *petere fontes*.”¹⁰ A learned chief justice of modern times, Lord Ellen-

¹ 3 Ves. 552.

² 1 Mylne and K. 95. And see 3 Durn. and E. 697.

³ 3 Atk. 713, 1 Ves. Sen. 306.

⁴ 2 W. Bl. 1118, 1119; 6 Durn. and E. 511; 14 East, 155; 1 Maule and S. 363; 8 Price, 357; Daniell, 205.

⁵ 5 Co. 25 a; 10 Co. 41 a, 117 b.

⁶ 4 Durn. and E. 310; 6 Durn. and E. 511; 14 East, 155; 8 Price, 357, 358; Daniell, 205.

⁷ 1 Maule and S. 363; 1 Barn. and Ald. 712.

⁸ 2 W. Bl. 1118, 1119.

⁹ 4 Co. Pref. xi; 5 Co. 25 a; 10 Co. 41 a, 117 b.

¹⁰ 4 Co. Pref. xi.

borough, illustrates the indiscretion of not seeking the fountain, by observing,—“It is extremely important, where citations are made from the year-books in the abridgments, to look at the cases themselves, from which the *dicta* are imported; for I have often found that a reference to the original case gives a very different meaning to the passage cited.”¹

One instance is met with, in which the Court of King’s Bench inspected the record of a case in Rolle’s Abridgment: and from which record it appeared, “that no such question, as supposed by Lord Rolle, was ever directly or indirectly decided, or could properly be argued.”²

[“In many cases,” says Lord Hardwicke, in *Giles v. Wilcox*,³ “abridgments are extremely useful, though sometimes they are prejudicial, by curtailing and mistaking the sense of the author.” “It is dangerous to found opinions on abridgments, however respectable.”⁴ The abridgment of the Factors’ act, in Abbot on Shipping, is erroneous.⁵ *Blin v. Campbell*,⁶ is criticised in *Gates v. Miles*,⁷ and said to be founded on an erroneous proposition in one of Chitty’s text-books, which he afterwards corrected. In Roscoe’s Evidence, page 567, 11th edition, is cited, *Bennington v. Bennington*, Croke, Eliz. 157, as deciding that, one tenant in common *can* have trespass against his co-tenant, for carrying off crops. It should be *cannot*. The error caused a wrong decision at *nisi prius*, corrected by the court in bank.⁸]

¹ 14 East, 155.

⁶ 14 Johns. 432.

² 2 Maule and S. 518–520.

⁷ 3 Conn. 64.

³ 2 Atk. 142.

⁸ *Jacobs v. Seward*, IV Law Rep.

⁴ *Irish v. Elliott*, Addison, 242, and an instance from Viner is given.

328 C. P., and see 12 Law Jour. C. P. 166.

⁵ Warren’s Law Studies, 491 note.

SECTION V.

OF HEARING ARGUMENTS OF COUNSEL.

THERE is a case, in which Sir R. P. Arden, when the cause was opened, expressed an opinion, but nevertheless suffered counsel to proceed in their argument. After which that learned judge observed,—“I am not sorry, though my first impressions upon this point are not removed, and though the time it has taken can now be very ill spared, that this cause has been heard throughout; for when gentlemen of eminence at the bar resist the first impressions of the court, it is my duty, however satisfied I may feel myself, not to decide, till I hear what can be said.”¹

[It is related of Judge Story,² that, being retained for the defendant, in *Rust v. Low*, 6 Mass. 90, when the case was about to come on, Mr. Prescott, who was of counsel with the plaintiff, said to Story,—“We shall beat you, Lord Hale is against you;” alluding to a note by that great lawyer to Fitzherbert’s *Natura Brevium*. At the argument, this note to Fitzherbert was cited for the plaintiff. Story, on opening for the defence, said,—“I think I shall satisfy the court that Lord Hale is mistaken.” “What, Brother Story!” said Ch. Justice Parsons, “you undertake a difficult task.” But Story did satisfy the judge that Lord Hale was in error. Mr. Somers, afterwards the great Lord Chancellor, when a very young man, rising after five or six seniors, said,—“That he was of the same side, but that so much had been already said, he had

¹ *Binford v. Dommett*, 4 Ves. 756,
758, 761.

² 1 *Life and Letters*, 117.

no room to add anything, and therefore he would not take up his Lordship's time by repeating what had been so well urged by the gentlemen who went before him." "Sir," said Lord Nottingham, "pray go on. I sit in this place to hear every body. You never repeat, nor will you take up my time; and therefore I shall listen to you with pleasure."¹

[It is one of the duties of a judge "to render it disagreeable to counsel to talk nonsense."²]

The courts have, it appears, a discretionary power with regard to a second argument of a case.³ [The law gives a right to be heard once only.⁴] After a cause has been once argued, then, before judgment, application is often made to the court to hear a second argument. This application is not always complied with;⁵ it has been refused in one instance, the court "thinking it to be a very clear case;"⁶ and again in a cause, where, counsel having "expressed his anxious desire that the court, if they had any doubt upon the question, would require another argument, on account of the great importance of the case, and of the topics which it embraced," Lord Ellenborough said,—“It does not appear to me, with respect to the only points which are before us in judgment in this case, that any further argument is necessary: the case has been already argued very fully and with great ability, and I do not think that further light can be thrown upon

¹ IV Camp. Lives of the Chan. ch. xcii, p. 270.

² VI Campbell's Lives Chanc., II, said to be a *dictum* of Lord Lyndhurst. Lord Campbell adds in a note that he made the statement before he was a judge, that after having been a judge, he adhered to the sentiment; and see

what he says, X Lives, &c., ch. ccxiii, p. 223.

³ See 2 Crompt. and M. 42.

⁴ *Sodonsky v. McKee*, 4 Marsh. (Ky.) R. 275.

⁵ *Combe v. Pitt*, 3 Burr. 1432.

⁶ *Edwards v. Moseley*, Willes, 195

the subject by another argument. If the court had any doubt upon the case, they would certainly take further time for the consideration of it; but it will be recollected that it has been depending for some time before us; and having been discussed at great extent, and the authorities diligently canvassed in the course of the last term, it has naturally led the judges to look with attention into the authorities then cited, and to take a full consideration of the record before us; and upon the most mature consideration of that record, and of the law connected with the subject-matter, I own, I have not a particle of doubt as to the judgment which it behooves the court to pronounce upon this occasion.”¹

Several cases occur, wherein a second argument has taken place,² or been allowed.³ It was allowed in *Booth v. Hodgson*, where Lord Kenyon observed,—“It is the great duty of every court of justice to administer justice as well as they can between the litigating parties; another, and not less material, duty is, to satisfy those parties that the whole case has been examined and considered: and it was with a view to the latter of these, to the pressing instance of the plaintiffs’ counsel, and not on account of any doubt on the subject, that this case stood for a second argument.”⁴ A second argument was also permitted in *Geyer v. Aguilar*, a ship insurance case, and in which the court was concluded by certain judgments given in France; and here Lord Kenyon said,—“When this

¹ *Burdett v. Abbot*, 14 East, 131; 5 Dow, 165, 200, 202.

² *Driver v. Frank*, 3 Maule and S. 25, 8 Taunt. 468, 2 Moore, 519, 6 Price, 41.

³ *Countess of Strathmore v. Bowes*,

7 Durn. and E. 482; *Salvin v. Thornton*, Ambl. 545. See 2 Crompt. and M. 42.

⁴ 6 Durn. and E. 408. See 2 Crompt. and M. 42.

case was argued in the last term, the parties desired to have a second argument; to this the court readily acceded, from an anxious wish that it might produce such arguments and reasons, as would enable them to form a judicial opinion according to their individual feeling. The situation of judges is such that they are sometimes obliged to decide against their own feelings as men. We come to decide this case bound and shackled by certain rules, from which we dare not depart.”¹

Several cases are found, in which the court has wished to have, or directed, a second argument.² As, in *Doe v. Hellier*, where Lord Kenyon observed,—“When this case was argued in the last term, we desired a second argument, not because light was not thrown upon the subject by the first argument, but on account of the novelty of the case, and because we wished to look into the authorities.”³ And, again, in *Lickbarrow v. Mason*, Ashhurst, J., saying,—“As this was a mercantile question of very great importance to the public, and had never received a solemn decision in a court of law, we were for that reason desirous of having the matter argued a second time, rather than on account of any great doubts which we entertained on the first argument.”⁴ A third instance is, *Purdew v. Jackson*, where Sir T. Plumer postponed the case, with this observation,—“The question is of too great and of too general importance to be decided without the most patient consideration, and without giving to both parties an opportunity of carefully investigating

¹ 7 Durn. and E. 695.

² *Vallejo v. Wheeler*, Cowp. 144, 154; *Thurston v. Mills*, 16 East, 268; *Evans v. George*, 12 Price, 76, 100, 1 *McClel. and Y.* 577; *Hill v. Bishop*

of London, 1 Atk. 618; *Hervey v. Aston*, 1 West's Cas. T. Hardw. 379.

³ 3 Durn. and E. 169.

⁴ 2 Durn. and E. 70.

all the authorities on the subject. It is therefore my wish that the case should stand over, in order to be again argued by one counsel on each side.”¹

Some cases have been argued three times.² [Scott *v. Paquet*³ was twice argued on appeal, and the case of Moss *v. Averill*,⁴ after being thrice argued in the Court of Appeals, was decided on an equal division of the Court.]

Holt *v. Ward* was argued four times.⁵

Tooke *v. Hollingworth*, a case, “very full of thorny points,” was argued three times in the King’s Bench; and, a writ of error having been brought on the judgment there, it was afterwards twice argued in the Exchequer Chamber. Here a length of time, “perhaps somewhat inconvenient to the parties,” elapsed, before the court could come to an agreement. It affirmed, it may be mentioned, the judgment below.⁶

Doe *v. Fonneréau* was twice argued, and after the second argument, Lord Mansfield delivered the opinion of the court in favor of the defendant. A few days after, however, his lordship said,—“The court had decided, on the authority of the case of Goodman *v. Goodright*, as reported by Sir James Burrow, but that they had since seen a manuscript note of that case, taken by Kenyon, which assigned a ground for the determination different from that stated by Sir James Burrow; that the court, upon this, entertained considerable doubts concerning the opinion delivered a few days before, and desired to have the case argued again.” The case was accordingly argued a third

¹ 1 Russ. 24.

² Jemmot *v. Cooly*, 1 Lev. 170; Freeman *v. Barnes*, 1 Ventr. 80, 1 Lev. 270.

³ 1 Law Rep. 557; Privy Council Cas.

⁴ 10 N. Y. 449.

⁵ 2 Stra. 938, Fitzg. 175, 275.

⁶ 5 Durn. and E. 215, 2 H. Bl. 501.

time; and the court changed their opinion, and gave judgment for the plaintiff.¹

A case has happened, where, after judgment given, "the matter was opened again, upon the mention of a case wherein the same point had been ruled differently; which case had not been adverted to in the course of the argument: the court, therefore, gave leave to the plaintiff's counsel to bring on the case again, that they might have an opportunity of re-considering their determination." The cause accordingly stood over, "when the court upon full consideration resolved to abide by their former opinion, before delivered."²

The utility and importance of counsel's argument are proved, if proof be needed, by the power which it has, sometimes to stagger,³ or to cause to fluctuate,⁴ and sometimes to convince,⁵ the mind of the court. Buller, J., begins his judgment in a cause, which had been twice argued, by observing,—“This case has been very fully, very elaborately, and very ably argued, both now and in the last term; and though the former arguments on the part of the defendant did not convince my mind, yet they staggered me so much that I wished to hear a second argument.”⁶ So in another cause, Abbott, C. J., says,—“This case has been most fully and satisfactorily discussed, and the opinion I had originally formed has been changed in the course of the argument.” And Bayley, J., stated,—“I enter-

¹ Dougl. 470, 489, ed. 1783, and 2 Dougl. 487, 507, 4th ed.

² Robinson v. Drybrough, 6 Durn. and E. 317.

³ 2 Durn. and E. 72.

⁴ 16 East, 233; 8 Bing. 535; 2 Younge and J. 410; 3 Younge and J. 27; 13 Price, 256.

⁵ The King v. Inhabitants of Idle,

2 Barn. and Ald. 153, 155; Rennell v. Bishop of Lincoln, 7 Barn. and Cr. 179; Child v. Stephens, 1 Vern. 101; Salvin v. Thornton, Ambl. 545, 548, 549; Ackroyd v. Smithson, 1 Bro. C. C. 503, cited Daniell, 228.—2 Bos. and P. 28; 3 Atk. 306.

⁶ 2 Durn. and E. 72.

tained at first great doubts in this case, which the discussion it has undergone has, however, entirely removed.”¹ And again, in another case, Bayley, J., observed,—“I have no difficulty in saying, that I came to the argument in this case with a very strong impression upon my mind against the plaintiff’s right, but the light which was thrown upon the subject by the powerful argument of Mr. Patteson, and the authorities to which I have referred, have induced me to think that my first impressions were erroneous.”² *Holt v. Ward* was, as before is noticed, argued a fourth time: “The court were extremely doubtful, but were convinced by the argument of Mr. Reeves, afterwards Lord Chief Justice of the Court of Common Pleas; and indeed it was a very fine one.”³ The “very able” argument of Mr. Scott, in *Ackroyd v. Smithson*,⁴ is thus mentioned by Chief Baron Richards. Speaking of that case, and Sir. T. Sewell’s decision there, and referring to certain other cases, the learned Chief Baron observes,—“Lord Eldon, who was then a very young man at the bar, was extremely dissatisfied with that decision, and advised an appeal; but his clients did not attend to him; but some other party in the cause, fortunately for justice, was advised to appeal, and that brought the case before Lord Thurlow. After Mr. Kenyon and the other counsel had been heard, Lord Thurlow was satisfied the decree was right; but on his asking Mr. Scott, who then appeared before him for the first time, what he had to say in favor of the claim of the heirs-at-law, Mr. Scott argued the case of his clients so ably, that Lord Thurlow said, I thought at first that Mr. Scott was clearly wrong,

¹ 2 Barn. and Ald. 153, 155.

² 7 Barn. and Cr. 179.

³ By Lord Hardwicke, 3 Atk. 306.

⁴ 1 Bro. C. C. 503, cited 5 Ves. 396.

but now I see he is right; and then the decree was made, which has since been followed in all the cases which have been cited.”¹

[In *Luntley v. Battine*,² the senior counsel for the defendant gave up the point, but the junior counsel so pressed the argument as almost to incur the displeasure of the Lord Chief Justice Ellenborough; at length Mr. Justice Bailey induced the Chief Justice to listen to the argument, which, having done, the Chief Justice united with the rest of the court in deciding for the defendant.]

In this place it may be mentioned, that a re-hearing of a case in chancery has in several instances had the effect to cause a judge to reverse the decree, which he had, on a former hearing, made in the cause.³

[In *Briggs v. Davis*,⁴ the Court of Appeals, on a bill to redeem, decreed a redemption to the appellant; the appellant, being dissatisfied with the terms on which the redemption was decreed, moved for a re-argument; the motion was denied, but the court intimated that it had erred in decreeing a redemption, and that the respondent might move for a re-argument to have the judgment changed to a judgment of affirmance.⁵ It is curious to reflect what would have been the effect of this error, supposing no re-argument had been moved for.

[Where a constitutional question is involved, a re-argument will be ordered, unless a majority of the whole court concur in the decision.⁶ “It would be indecorous to allow what would be substantially an ap-

¹ Daniell, 228.

² 2 Barn. and Ald. 234.

³ *Stephens v. Stephens*, 2 P. W. 323; *Walmesley v. Booth*, 2 Atk. 25; *Galton v. Hancock*, *ibid.* 424-439;

Pickering v. Lord Stamford, 3 Ves. 336.

⁴ 20 N. Y. 16.

⁵ 21 N. Y. 574.

⁶ *Briscoe v. Bank of Kentucky*, 8

peal from one set of judges to another set of judges of the same court. Unless, therefore, it is alleged that the former court overlooked some material fact or statute, or failed to notice some important legal question or recent decision, it would be subversive of every good end by granting a re-argument to subject its decisions to a new examination by a new set of judges." ^{1]}

An argument of counsel has frequently occasioned the praise of the bench, and sometimes even the court's expression of its obligation to counsel.² In one instance, "the court observed that the question had been very admirably argued;" and on an after occasion expanded this observation by remarking,—“One point in this case is of considerable importance, and of no inconsiderable difficulty. If we saw any hope of obtaining better information, we should wish it to be argued again, but it has been extremely well argued on both sides, and every topic has been brought forward which could bear on this point.”³ Another instance is, where Lord Ellenborough began his judgment by saying,—“This case has been argued with great industry and learning; and the court cannot but feel obliged to the gentlemen who have argued it, for the pains which has produced so much learning.”⁴ In a third case, Lord Mansfield said, “the court were very much obliged to the gentlemen, for taking so much pains in their arguments; and he thought nothing could be added to them: therefore there was no need of any further argument.”⁵ A fourth case offers a

Pet. 118; and see *N. Y. v. Miln*, 9 Pet. 85.

¹ *McGarry v. Board of Supervisors*, 1 Swe. 219; and see *Newell v. Wheeler*, 4 Rob. 190; *Trinity Church v. Higgins*, *id.* 372; *Mount v. Mitchell*, 32 N. Y. 702.

² 2 Durn. and E. 72; 5 Ves. 875.

³ 5 Taunt. 668, 669, 3 Barn. and Cr. 322.

⁴ 1 Maule and S. 661.

⁵ 5 Burr. 2785.

striking singularity in the happy medium there hit. A proposal for a second argument, Lord Mansfield met with this observation,—that the 'cause "had been extremely well argued by the gentlemen on both sides; who had both of them argued like lawyers, and had not said a word too much or too little."¹ [Perhaps as handsome a compliment, as was ever paid by the bench to the genius of the bar, was given, in the language of Chief Justice Marshall, in overruling a position of William Pinkney,—“With a pencil dipped in the most vivid colors, and guided by the hand of a master, a splendid portrait has been drawn, exhibiting this vessel and her freight as forming a single figure, composed of the most discordant materials of peace and war. So exquisite was the skill of the artist, so dazzling the garb in which the picture was presented, that it required the exercise of that cold investigating faculty, which ought always to belong to those who sit on this bench, to discover its only imperfection, its want of resemblance.”²]

SECTION VI.

OF OBTAINING THE OPINION OF ANOTHER JUDGE, OR COURT.

A COURT of law sometimes obtains the opinion of all the judges of the other law courts, on a question which it has to decide. An instance of this desire of assistance, is Calvin's case; of which Coke, who reports it, says,—“After this case had been argued in the Court of King's Bench at the bar, by the counsel

¹ 3 Burr. 1432.

² The Nereide, 9 Cranch, 480—3d Curtis' Decisions, 418.

learned of either party, the judges of that court, upon conference and consideration of the weight and importance thereof, adjourned the same (according to the ancient and ordinary course and order of the law) into the Exchequer Chamber, to be argued openly there, first by the counsel learned of either party, and then by all the judges of England.”¹ And in a comparatively modern cause, *Smith v. Richardson*, which came before the Court of Common Pleas on a case made at the assizes, and reserved for the opinion of the court, “this being a new case, and a case of great consequence, the court thought proper to desire the opinion of the rest of the judges, not only to guide their own judgment, but that there might be a uniformity of opinion for the future in a matter of so great moment.”²

“In many cases, where the law has been considered differently in the two courts of king’s bench and common pleas, the practice has been to call in the opinion of the judges to determine which was right.”³

In the Court of Chancery, the Lord Chancellor, in order to determine a question, which there arises, and which is a legal, as distinguished from an equitable, question,⁴ or, in other words, is a question, or point of common law,⁵ a mere point of law,⁶ or a mere question in law,⁷ very commonly seeks the opinion on that question of a court of common law, the king’s bench, or common pleas.⁸

¹ 7 Co. 2.

² Willes, 20.

³ By *Graham, B.*, 1 M’Clel. and Y. 598.

⁴ 3 Atk. 554; 2 Swanst. 274; 6 Barn. and Cr. 413, 420; 3 Bl. Com. 452.

⁵ 4 Burr. 2377, 2378.

⁶ 1 Ves. Sen. 35.

⁷ 2 Atk. 250.

⁸ 3 Atk. 554; 1 Ves. Sen. 35; 1 Swanst. 313; 2 Swanst. 273, 274, 275; 2 Burr. 1133, 1134; 4 Burr. 2377, 2378; 1 W. Bl. 222. And see 1 Meriv. 494.

Such opinion is sought by sending to the court, and to be there solemnly argued,¹ a case, namely, a statement of the circumstances, out of which arises the question required to be determined. The court of law then gives its opinion thereon, in its written certificate, which it returns to the chancery.

In similar circumstances, and in like manner, the Master of the Rolls,² or the Vice-Chancellor,³ obtains the opinion of a court of law.

The opinion of a court of law it is sometimes proper so to require, when the question is a new case,⁴ a new point,⁵ or a question on which there is no decision,⁶ or not one case already in point determined,⁷ a question that is one of great nicety,⁸ or on which the opinion of one judge is one way, and that of another judge the other,⁹ or the question being in a suit to oblige a purchaser to specifically perform his contract of purchase, conflicting authorities create too much doubt in the question, to make it fit that the Court of Chancery should bind the purchaser, without the opinion of a court of law.¹⁰

The question so proposed to a court of law must, it seems to be considered, be a legal, as distinguished from an equitable, question.¹¹ In *Bayley v. Morris*, in the year 1796, a case was directed for the opinion of

¹ 1 Ves. Sen. 35.

² 1 Russ. 291; 6 Barn. and Cr. 403. *Daintry v. Daintry*, 6 Durn. and E. 307, and in the year 1795, appears to be the first instance in which the Court of King's Bench ever certified their opinion on a case sent there from the Master of the Rolls. In 1743, in the case of *Colson v. Colson*, it was by "an idle formality" refused. 2 Atk. 247, 248, 6 Durn. and E. 313.

³ 2 Sim. and St. 544; 3 Barn. and Cr. 705.

⁴ 1 Ves. Sen. 35; 4 Bro. C. C. 371.

⁵ 3 Atk. 554.

⁶ 2 Swanst. 273.

⁷ 2 Atk. 250.

⁸ 1 Russ. 291.

⁹ 7 Ves. 234.

¹⁰ 5 Madd. 319, 320, 5 Barn. and Ald. 561.

¹¹ 6 Barn. and Cr. 412, 413, 420, 422; 1 Dow and Cl. 296, 299, 300, 301; 2 Russ. 489; 2 Sim. and St. 553; 3 Bl. Com. 452.

the Court of King's Bench, upon the question, what estate a particular person took in certain premises under a settlement. And on the ground that the legal estate was in trustees, that court declined to give any opinion.¹ In *Parsons v. Parsons*, in the year 1800, a case was sent to the Court of King's Bench; but "in consequence of its being stated as a trust," in other words, "in consequence of the fund being stated to be in the hands of trustees," that court refused to answer it.² In *Houston v. Hughes*, a case was sent by the Master of the Rolls for the opinion of the Court of King's Bench. It arose on the construction of a will; and, besides a question relative to the estate limited to trustees, several other questions were submitted to the court. In the early part of the argument, Bayley, J., asked counsel (Denman), whether this court were expected to certify what estates the plaintiffs would have taken, if the legal estates had not remained in the trustees. Denman said that the court did so certify in *Murthwaite v. Jenkinson*,³ and that the questions in this case were framed in a similar manner, for the purpose of obtaining the opinion of this court upon that supposition. Bayley, J., said, the old course used to be, for the Court of Chancery to state the case as if all the estates were legal estates; and that he felt a great difficulty in saying that a court of law should give an opinion, as to what would have been the effect of the will if certain equitable devises had been legal devises. The old course invariably was, so to mould the case in a court of equity, as to present it to a court of law as a simple legal question. After this intimation from the court, the

¹ 4 Ves. 788, 790, 793, 794.

³ 2 Barn. and Cr. 357.

² 5 Ves. 581.

only question discussed was, whether the trustees took the legal fee in the freehold estates. At the conclusion of the arguments of counsel, Bayley, J., said—"A court of law sits for the purpose of giving opinions upon legal questions only. If a will is so framed as to present for consideration questions upon equitable estates, it is peculiarly for a court of equity to say in what manner that will should be moulded; so as to present a legal question for the consideration of a court of law. And if there be any difficulty in converting the equitable estates in the will into legal estates, that is for the the consideration of a court of equity, where the effect of equitable devises is understood. It seems to me, that if the Court of Equity wish to have our opinion as to those parts of this will which give equitable interests, it is for that court so to mould the will as to present a legal question for our consideration. If, therefore, we should be of opinion in this case that the legal estate in fee is vested in the trustees, we shall certify to that effect to the Court of Equity, and forbear answering the other questions." In the certificate, which the court afterward sent, the court, having expressed their opinion that the trustees took under the will an estate in fee simple, subjoined—"As we are of this opinion, the interests of the other parties mentioned in the questions are equitable interests only, and we have not given any opinion as to them."¹

This understanding of the subject is sustained by Lord Eldon's opinion, that, in *Duffield v. Elwes*,² the Court of King's Bench properly gave no opinion as to the resulting trust there, "that being only for the con-

¹ 6 Barn. and Cr. 403, 412, 413, 420, 422; 9 Dowl. and Ryl. 464.

² 3 Barn. and Cr. 705, 5 Dowl. and Ryl. 764, 2 Sim. and St. 544.

sideration of a Court of Equity.”¹ For in the same case, *Duffield v. Duffield*, in the House of Lords, Lord Eldon remarks,—“It is clear that a Court of Equity can call for the opinion of the courts of law, by stating cases for that opinion; and then the courts of law consider what alone it is proper for them to consider; that is, to whom the legal estate belongs, or what amounts to a legal estate. If an estate is given to A. B., in trust for C., the court of law has only to consider the question with reference to A. B., but the trust belongs to the jurisdiction of the Equity Court.”²

Formerly a practice of the common law courts was, not to give in court the reasons of their opinion, which they returned to the Court of Chancery.³ Burrow, reporting a case where, in 1756, the Court of King’s Bench certified their opinion to the Court of Chancery, notes that “the course has always been, for the judges not to give any reasons in court, upon a case sent out of chancery for their opinion.”⁴ And, reporting a case, in which, in 1761, the King’s Bench returned a certificate, he here also subjoins,—“Agreeable to ancient usage, upon cases referred out of chancery, the court did not give the reasons of their opinion, nor mention the ground upon which they formed it.”⁵ In the same case, Lord Mansfield pursued this usage, expressly as “the established practice of the court.”⁶ At the same period, however, it appears that sometimes the reasons of the court’s opinion were given in the certificate itself.⁷ But it was not usual so to give

¹ 1 Dow and Cl. 296, 300, 301.

And see 2 Sim. and St. 553.

² 1 Dow and Cl. 299.

³ 1 Burr. 51; 2 Burr. 719, 1134; 1 W. Bl. 254; 3 Wils. 13; 3 Durn. and E. 96.

⁴ 1 Burr. 50, 51.

⁵ 2 Burr. 1134.

⁶ 1 W. Bl. 254. And see 3 Durn. and E. 96.

⁷ *Gore v. Gore*, 2 P. W. 63, 64, 9 Mod. 5, 10 Mod. 501; *Colson v. Colson*, 2 Atk. 250.

them.¹ [“Lord Eldon, when Chief Justice of the Common Pleas, introduced the excellent custom of giving *reasons* for the certificate of the judges upon a case from a Court of Equity upon a legal question; but when Lord Chancellor, he so carped at the *reasons* of Lord Kenyon and other common law judges, that they refused to do more than simply to give an answer in the affirmative or negative to the questions put to them.”²] On the certificate in the case in 1756, above mentioned, Burrow remarks, that it “seems carefully penned, to mark the grounds upon which it was founded.”³ And the practice of not giving in court the reasons of the opinion has in many later cases been departed from. In 1774, the Court of King’s Bench wholly and avowedly departed from that practice, when Lord Mansfield, delivering the opinion of the court, introduced it as follows:—“I found it a custom, in cases sent by the Court of Chancery for our opinion, to certify it privately to the Lord Chancellor in writing, without declaring in this court either the opinion itself, or the reasons upon which it is grounded. But I think the custom wrong, as well as unsatisfactory to the bar: and therefore in the two cases that now wait our certificate, and for the future, we shall declare our opinion in this court.”⁴ In a case in 1795, the judges of the King’s Bench delivered in court their opinions previously to sending their certificate: Lord Kenyon, who was then Chief Justice, prefacing his opinion by saying,—“We will certify in this case; but I will now say a few words, to show the founda-

¹ By Lord Hardwicke, 5 Madd. 346.

² IX Camp. Lives of Chanc., ch.

cxvii, p. 215; Thompson v. Lady Lawley, 2 Bos. and Pul. 303.

³ 1 Burr. 51.

⁴ Wright v. Holford, Cowp. 34.

tion of my opinion.”¹ In 1800, the Court of Common Pleas, in like manner, gave their opinions in a case, where Lord Eldon, the Chief Justice, expressly followed that example of Lord Kenyon, and noticed, it had “not been unusual; upon similar occasions, to mention the grounds upon which the opinion of the court has proceeded.”² And in 1806, in a case where the Court of Common Pleas gave in court the reasons of the certificate, which they sent to the Lord Chancellor, Sir J. Mansfield commenced the delivery of his reasons by observing,—“This case comes from the Court of Chancery. The opinion of the court, therefore, is not to be delivered in public, but will be certified to the Lord Chancellor. It is usual, however, to state the reasons, upon which the certificate is to be founded.”³ On one occasion of a case sent to the Court of King’s Bench, Lord Kenyon not only expressed in court the grounds of the certificate, but read the certificate in court.⁴ In a recent case, the Court of Common Pleas, after, it would seem, sending their certificate, stated in court the general grounds upon which the answers certified by them had proceeded.⁵

At the present day, the reasons of the opinion of the court of law are sometimes not given, either in court, or in the certificate sent to chancery.⁶ The disadvantage and inconvenience of this practice are pointed out by Sir J. Leach in a late cause, in which

¹ Lane *v.* Earl Stanhope, 6 Durn. and E. 352.

² Thompson *v.* Lady Lawley, 2 Bos. and P. 308.

³ Wright *v.* Bond, 2 Bos. and P. New Rep. 129.

⁴ Daintry *v.* Daintry, 6 Durn. and E. 314.

⁵ Greenham *v.* Gibbeson, 10 Bing. 363.

⁶ Murthwaite *v.* Barnard, 2 Brod. and B. 623; Murthwaite *v.* Jenkinson, 2 Barn. and Cr. 357; Duffield *v.* Elwes, 3 Barn. and Cr. 705, 2 Sim. and St. 544; Duffield *v.* Duffield, S. C., 1 Dow and Cl. 268; Badham *v.* Mee, 7 Bing. 695, 1 Mylne and K. 32, 54.

he had directed a case for the opinion of the Court of Common Pleas.”¹ “In this case,” his honor observes, “as it is unfortunately the practice in all cases, the Court of Common Pleas has not assigned the reasons on which its opinion is founded. The practice of the courts of common law not to assign the reasons of their opinions upon cases sent from Courts of Equity is a practice of modern introduction, and it is much to be regretted; being at once disadvantageous to the public, and inconvenient to the court directing the case, which is deprived by this practice of the assistance it would derive from the opinion of the court of law, were the grounds of such opinion disclosed. The object of directing a case is, to know the opinion of a court of law, upon the point in question; not, indeed, that such opinion is to be treated as a decision, but in order that the Court of Equity may be assisted in forming its judgment. It might well be expected, therefore, that the court, which directs the case, should have the advantage of knowing the grounds upon which the opinion of the court of law is founded.”²

After receipt of the certificate of the court of law, sometimes the Court of Chancery sends the same case to another court; as to the Common Pleas, if the first time it was sent to the King’s Bench,³ or to this court, if before it was sent to the Common Pleas.⁴ The two common law courts have sometimes differed in their opinions.⁵

To determine a question of law, the Court of Chan-

¹ And see 1 Dow and Cl. 300.

² *Badham v. Mee*, 1 Mylne and K.
54.

³ 1 Dow and Cl. 296.

⁴ 1 Turn. and R. 25; 1 Russ. 292.

⁵ 1 Turn. and R. 25; 1 Dow and Cl. 296. In *Gore v. Gore*, 2 P. W. 63, 64, the judges of the King’s Bench certified their opinion against the opinion of their predecessors in the court.

cery, in the manner mentioned, sends a case for the opinion of the judges. To determine a question of fact, the same court sometimes directs an issue,¹ or an action,² to be tried at law. In other instances, it may take on itself to decide a question of fact;³ and it may sometimes be the duty of the court so to decide it, as where, to try the question, "there must be an account, and the case requires that examination of books, letters, and accounts, which cannot conveniently be had in the course of a trial at *nisi prius*."⁴ Lord Eldon, speaking in the Court of Chancery, says,—“There is no doubt, that according to the constitution of this court, it may take to itself the decision of every fact put in issue upon the record. . . . It is pretty clear, that, courts of equity in ancient times were more in the habit of taking to themselves the decision of questions of fact, than they have thought wise and discreet in later times.”⁵ This opinion, the same learned judge has repeated in these words,—“Beyond all question it belongs to the constitution of courts of equity to decide upon matters of fact, if they think proper. But courts of equity have, for a great number of years, where questions of fact have been disputable, thought it a more proper exercise of their jurisdiction, to have them determined by a jury.”⁶

The Court of Chancery is competent to declare an

¹ *Binford v. Dommett*, 4 Ves. 758, 762; *O'Conner v. Cook*, 6 Ves. 665, 8 Ves. 535; *Winchilsea v. Wauchope*, 3 Russ. 441; 1 Dow and Cl. 299, 300; 4 Bligh's New Rep. 470, 471.

² *Smith v. Earl of Pomfret*, 2 Dick. 437; *Ex-parte Kensington*, Coop. 96; where see a difference between an

issue and an action. See also 2 Ves. Jun. 260.

³ 6 Ves. 671; 8 Ves. 536; 1 Dow and Cl. 299, 300; 4 Bligh's New Rep. 470, 471. And see 3 Russ. 451.

⁴ *Anderson v. Maltby*, 4 Bro. C. C. 429; 2 Ves. Jun. 260, 261.

⁵ 6 Ves. 671.

⁶ 8 Ves. 536.

opinion on a legal question;¹ and sometimes it may be the duty of the court to declare this opinion, without sending the question to a court of law.² Lord Eldon instils this duty by observing in the Court of Chancery,—“Where there is a clear matter of law, I take it to be very much the duty of this court, to give its opinion on that matter of law.”³

An idea at one time existed, that when the Court of Chancery sent a case to law, the court was concluded by the opinion of the judges.⁴ In *Cook v. Booth*, Lord Thurlow said, “that sitting as chancellor, when he asked the opinion of a court of law, whatever his opinion might be, he was bound by that of the court of law.” And in the same cause he held himself to be bound by the certificate of the King’s Bench, to which court a preceding chancellor, Lord Bathurst, had sent a case. And it is observable that Lord Thurlow, so thought and acted, when, at the same time, he said he should be very glad if Mr. Booth would carry the matter to a superior tribunal.⁵

Later judges have, however, considered, and the present understanding appears to be, that the Court of Chancery is not bound by the opinion of the court of law;⁶ that notwithstanding such opinion, the Court of Chancery is free to form its own opinion on the case, and by this opinion to frame its decision in the suit.⁷ Lord Eldon, in 1818, expressly stated in the Court of

¹ Swanst. 327; 4 Russ. 166; Mad. and Gel. 273; 1 Dow and Cl. 296, 299, 300, 302. See 1 Meriv. 494.

² Mad. and Gel. 273.

³ 2 Russ. 229.

⁴ *Gore v. Gore*, 9 Mod. 4, 10 Mod. 501; 2 Stra. 958; 2 P. W. 28. And see 9 Mod. 149; 1 Atk. 350, and 2 Ves. Sen. 153.

⁵ *Cooke v. Booth*, cited 3 Ves. 208.

⁶ 1 Swanst. 320; 2 Sim. and St. 556; 11 Price, 18; 6 Barn. and Cr. 420; 1 Dow and Cl. 296, 299, 300, 302 1 Mylne and K. 54.

⁷ *Ibid*; *Prebble v. Boghurst*, 1 Swanst. 309, 314, 320; 1 J. Wilson, 155, cited 11 Price, 18.

Chancery, that "it is clear that this court is not bound by the certificate of the court of law;"¹ and this statement his lordship made in a case, in which he overruled an opinion of the Court of Common Pleas.² Chief Baron Richards, in 1822, noticing this case, and Lord Thurlow's apprehension of the obligation of chancery to abide by the certificate at law, says,— "Now, certainly that is not in the present day considered to be the effect of the opinion of courts of law on cases sent for their judgment. The present chancellor clearly does not consider himself bound by the certificate of the judges of a court of law. In a very recent case,³ in which Lord Eldon called in Mr. Justice Abbott and myself, we reviewed the opinion of the Court of Common Pleas, and the result was, that we overruled it."⁴ The same liberty of opposing the opinion at law is maintained by Lord Eldon in the House of Lords, in 1827, where, in a cause in which the Vice-Chancellor had sent a case to the Court of King's Bench, and on its coming back he differed from the opinion of that court, Lord Eldon observed on these circumstances,— "It is quite clear, that the equity judge in these cases may differ from the judges of the courts of law, and may decide in opposition to the opinions stated by the common law judges in their certificate. Lord Thurlow once sent a case for the opinion of the Court of King's Bench, and, not being quite satisfied with that opinion when given, he sent to the court again for a better answer. Lord Kenyon was not very well pleased at this proceeding of his friend Lord Thurlow, but the utility of it was manifested by the result; for the court gave a unanimous

¹ 1 Swanst. 320.

² Prebble v. Boghurst, 1 Swanst. 309.

³ Prebble v. Boghurst, above.

⁴ 11 Price, 18.

opinion in contradiction to its former judgment. I myself, on one occasion, sent a case for the opinion of the Court of King's Bench, on the question as to what estate a party took in certain premises, and the court unanimously certified that the party took an estate of freehold. Not being quite satisfied with that opinion, I took the liberty to send the same question for the opinion of the judges of the common pleas, and they unanimously certified that the party took no estate at all. I was impertinent enough to think that they were both in the wrong, and decided on my own view of the case; and with that decision the parties were satisfied, and no more was heard of the case."¹ And in the same cause in which these observations were made, Lord Eldon, in 1828, repeated his opinion, by saying,—“A court of equity may send cases to the judges of common law for their opinion as to the law, and to juries for their opinion as to facts, in order to inform the conscience of the court. But the judges in equity, whether they ask the opinions of the common law judges or not, may decide of themselves, both as to the law and the facts. I mention this, because in looking at some of the common law reports, it seems sometimes to have been thought, that the equity judges knew nothing about law; and they say, that is only a Chancery decision. The judge in equity sends a case for the opinion of the common law courts. A certificate is returned without stating the grounds of the opinion. Whether that should be altered or not, I do not know; but in sending to the judges for their opinion in matter of law, or to a jury upon an issue as to matter of fact, it is clear that you reserve to yourself the right to determine finally and judicially

¹ *Duffield v. Duffield*, 1 Dow and Cl. 296. And see *ibid*, 302.

both as to the law and the facts. . . . It is undeniable, that if the conscience of the judge in equity is not satisfied, it is his duty to differ from the common law judges."¹ If further authority be required to sustain this doctrine, it is found in a court of law itself. In delivering his opinion in the King's Bench on a case sent by the Master of the Rolls, for the opinion of that court, Bayley, J. said,—“When the court of equity sends a case for the consideration of a court of law, it is not that the court of law is to bind the court of equity, but to assist it in coming to a conclusion on the subject.”²

At the hearing of a cause in chancery, the Lord Chancellor is not unfrequently assisted by judges of the courts of law. That assistance he seeks to aid him in his decision in the cause; and the judges, whom he selects for the purpose, then attend in court, and deliver their opinions on the matter submitted to their consideration.³ By those opinions they advise⁴ the chancellor. To seek this advice Lord Hardwicke considered as a right. Having been assisted by judges in the Court of Chancery, his lordship expresses his obligation to them for their learned advice and assistance, “the right to which,” he adds, “I esteem one of the greatest privileges belonging to the person, who presides in this court.”⁵ Sometimes the Lord Chancellor is assisted by the Master of the Rolls, as well as

¹ 1 Dow and Cl. 299, 300, 302.

² 6 Barn. and Cr. 420.

³ Fry v. Porter, 1 Mod. 300; Duke of Norfolk's Case, or Howard v. Duke of Norfolk, 3 Ch. Cas. 14.—3 Ch. Cas. 55, 129; 2 Mod. 86; 2 P. W. 326; 1 Atk. 40, 165, 362; 1 Ves. Sen. 349; 1 West's Cas. T. Hardw. 379; 4 Bro. C.

C. 372, 380; 15 Ves. 92; 1 Swanst. 314; 3 Swanst. 641; 2 Russ. 489, 490.

⁴ 3 Ch. Cas. 28; 1 Atk. 347, 348; 2 Ves. Sen. 190; 1 West's Cas. T. Hardw. 414; 15 Ves. 111, 112; 2 Swanst. 457.

⁵ Hervey v. Aston, 1 West's Cas. T. Hardw. 414.

by judges, or a judge, of a court of law.¹ [Lord Clarendon, when Chancellor, "had always two Masters in Chancery to keep him right in matters of practice, and he never made a decree without the assistance of two of the judges."² Bishop Burnet, in his *Life of Sir Matthew Hale*, says,—“He was frequently called into the Court of Chancery to advise the Lord Chancellor or Lord Keeper.”]

The Chancellor is not bound by the opinion of the judges, whose assistance he has so called in: if the reason of the judges has not convinced him, it is his duty to act according to his own understanding.³ Lord Nottingham exercised this duty in *The Duke of Norfolk's case*, saying,—“As to the learned judges that assisted me at the hearing, the decree is mine, and the oath that decree is made upon is mine; their's is but learned advice and opinion. . . . It is my decree; I must be saved by my own faith, and must not decree against my own conscience and reason.”⁴

In a suit instituted in chancery for the execution of the trusts of a will, and in which Lord Eldon objected to sending a case to a court of law, his objection being,—“that it will come back again in a state, which will leave the principal questions undetermined,” his lordship observed,—“The better way of dealing with such questions as arise here will be, to have them disposed of in a court of equity, assisted by two of the judges. They will help us to determine

¹ *Earl of Chesterfield v. Janssen*, 1 Atk. 301, 339, 2 Ves. Sen. 125, 1 Wils. 286; *Burgess v. Wheate*, 1 Eden, 177, 239, 1 W. Bl. 123, 173.

² IV Camp. Lives of the Chanc. ch. lxxix, p. 70.

³ 9 Mod. 5, 149; 10 Mod. 502; 1

Dow and Cl. 299, 300, 302. See 1 Mod. 313, 1 Atk. 350, and 2 Ves. Sen. 153.

⁴ *Duke of Norfolk's Case*, or *Howard v. Duke of Norfolk*, 3 Ch. Cas. 28, 37, 39, 47, 52, 2 Swanst. 457.

the legal effect of the devises; and I remember cases in which the judges of courts of law, when sitting with the Lord Chancellor, have not scrupled to state their opinion as to the equitable questions." The cause was accordingly heard before Lord Eldon, assisted by the Chief Justice of the King's Bench and the Chief Justice of the Common Pleas.¹

When the Lord Chancellor seeks the opinion of judges of a court of law, he sometimes obtains it, through a note which he receives from them containing such opinion.² [John Campbell, afterwards Lord Campbell, was deputed by the Common Pleas to go as *amicus curiæ* to the King's Bench, and inquire what was the practice there as to taking up causes out of their order, to avoid an anticipated injunction.]

In a cause in Chancery, where a question of law depended "upon a principle applying to cases both in this court and at law," Lord Eldon determined to consult the judges, saying he would himself "speak to the Common Law judges upon the subject:" on that question, his lordship obtained the opinion of the Courts of King's Bench, Common Pleas, and Exchequer, and of the Master of the Rolls, and Vice-Chancellor.³

SECTION VII.

OF BIAS.

THERE is one kind of bias, which the courts possess, and suffer to incline them in forming the judg-

¹ White *v.* Vitty, 2 Russ. 484, 489,
4 Russ. 584.

² Dixon *v.* Ewart, 3 Meriv. 333.

³ Earl Cholmondeley *v.* Lord Clin-

ton, 19 Ves. 276, Coop. 88, cited Jacob, 303.

⁴ On bias, or favor, see, besides the authorities after referred to, 1 Burr.

ments which they give. It is a bias favorable to a class of cases, or of persons, as distinguished from an individual case, or person. A bias, which on some subjects sways them is, convenience.¹ And whatever the bias, or moving principle, in the courts may be, it is certain that a bias favorable to a class of cases, or of persons, is frequently met with.

[On the trial of a duellist for murder, Mr. Justice Fletcher summed up as follows:—"Gentlemen, it's my business to lay down the law to you, and I will. The law says the killing a man in a duel is murder, and I am bound to tell you it is murder; therefore, in the discharge of my duty, I tell you so; but I tell you at the same time, *a fairer duel* than this I never heard of in the whole course of my life."²

[It was said by Lord Hobart,—“I commend the judge who seems fine and ingenious, so it tend to right and equity; and I condemn them who either out of pleasure to show a subtle wit will destroy, or out of incuriousness or negligence will not labor, to support the act of the party by the art or act of the law.”]

A constant wish of the courts is, to favor an heir at law;³ as where there is “an heir on the one side and a mere volunteer on the other:”⁴ They possess a strong reluctance to disinherit an heir at law:⁵ “courts always lean in favor of an heir at law capriciously disinherited:”⁶ “Determinations in cases of revocations of wills have always been favorable to the

419, 421, 1 Bos. and P. 614, 3 Bos. and P. 456, 2 Ves. Jun. 648, Jacob, 115, 1 Turn. and R. 350.

¹ 1 Ves. Sen. 13, 14; 3 Atk. 524.

² O'Flanagan's Lives of the Lord Chancellors of Ireland. 309.

³ 1 W. Bl. 256.

⁴ Willes, 570.

⁵ Ambl. 645.

⁶ By Lord Manners, 1 Ball and B.

heir at law:"¹ "There are a great many determinations touching the revocation of wills, and very nice artificial distinctions are made in favor of heirs at law:"² "It is not to be controverted," says Lord Hardwicke, "but that the favor of courts to heirs at law, I mean judicial favor, has prevailed in some instances."³

Formerly, joint-tenancy of land was favored in a court of law. Holt, C. J., says—"Joint-tenancy is favored in the law; and the reason of it is, that as the law does not love fractions of estates, no more does it love them in tenures. Now joint-tenants are but as one tenant; but in case of tenancy in common all the entire services are multiplied, 6 Co. 1, 2, Bruerton's case; for which reason joint-tenancy is favored."⁴ Lord Hardwicke states in the Court of Chancery—"It is true, that joint-tenancies are not favored here: as introducing inconvenient estates, and making no provision for families; and now courts of law also lean against them; though formerly it was said by Chief-Justice Holt, that they were favored, which was on a technical reason, because the law was averse to multiplication of tenures and services; which being now reduced to socage, and no burthen, the construction is the same in all courts."⁵

Forfeitures of copyhold estates are "odious in the law," and the courts have always leaned against them.⁶

The old cases, upon the subject of tenant's fixtures, "leant to consider as realty whatever was annexed to the freehold by the occupier; but in mod-

¹ By Lord Hardwicke, 1 Wils. 310,
3 Atk. 747, Ambl. 117, 227.

² By Wilmot, C. J., 3 Wils. 13.

³ 3 Atk. 806.

⁴ 1 Lord Raym. 631.

⁵ 1 Ves. Sen. 13, 14; 1 Wils. 165;

3 Atk. 524.

⁶ 3 Durn. and E. 172.

ern times the leaning has always been the other way in favor of the tenant, in support of the interests of trade, which is become the pillar of the state."¹

The Court of Chancery "leans against considering legacies as specific, because of the consequences."²

In construing a will, where a father is making a provision for his children, which is called a debt of nature, the Court of Chancery will strain in their favor.³

The courts lean against double portions for children;⁴ against "double provisions and double satisfactions."⁵

There is a strong disposition in the Court of Chancery, to construe a residuary clause in a will, so as to prevent an intestacy with regard to any part of the testator's property.⁶

The Court of Chancery, observes Lord Camden, "has justly a partiality and predilection to equitable assets, which ought to turn the scale in all cases, where the matter hangs in equal balance."⁷

In a hard case, it may sometimes be impossible for the court not to feel for the individual obliged to endure that hardship.⁸ But it is certain the courts do not permit the mere fact of hardship in a case to outweigh the law of it.⁹ Relative to hardship, the

¹ 2 East, 90.

² Ambl. 310; 4 Ves. 565, 572, 752; 8 Ves. 413. On some advantages and disadvantages, which attend a specific legacy, see 1 Vern. 31; 1 P. W. 540, 679, 680; 3 P. W. 385; Cas. T. Talb. 152; Prec. Ch. 401; 1 West's Cas. T. Hardw. 483; 2 Ves. Sen. 624.

³ 3 Atk. 222.

⁴ M'Clel. 366; 13 Price, 599.

⁵ 3 Atk. 421.

⁶ 2 Meriv. 386; 1 Russ. 223.

⁷ 1 Bro. C. C., 138, n.; 1 Dick. 387.

⁸ 15 East, 604, 605.

⁹ Willes, 98; Cowp. 191, 192; 7 Durn. and E. 419; 15 East, 605; 4 Maule and S. 12; 4 Bro. C. C. 124, 519; 1 Ves. Jun. 131, 132; 2 Ves. Jun. 34, 35; 3 Ves. 202; 5 Ves. 581; 1 Jac. and W. 244; 4 Madd. 418; 2 Crompt. and M. 53, 54.

Bench uses these, or the like,¹ expressions: "The court is governed by the principle of law, and not by the hardship of any particular case:"² "Considerations of public policy often outweigh the hardship of particular cases:"³ "This may be a case of individual hardship, but the court is bound to proceed upon those principles, which are deemed essential to the general interests of mankind:"⁴ "It is better for the public, that courts should adhere to general established rules, than that those rules should yield to circumstances of compassion in particular cases, however strong:"⁵ "The hardships of a particular case are no foundation for a determination either in a court of law or equity:"⁶ "It is part of the infirmity of human legislators, that the general rule which they prescribe, will work hardship in particular cases; and it is for the legislature to afford such relaxation of the rule, as can be done with safety."⁷

The following case mentioned by Lord Ellenborough is a striking example of hardship, and the inflexibility of the law where it happens. The rule of law applicable to it is, that marriage and the birth of a child, where both these circumstances concur, are a presumptive revocation of a will made before the marriage; but marriage alone does not cause that revocation. "I remember," says Lord Ellenborough, "a case some years ago of a sailor, who made his will in favor of a woman with whom he cohabited, and afterward went to the West Indies, and married a woman of considerable substance; and it was held,

¹ Willes, 458; Cowp. 192; 7 Durn. and E. 415; 1 Crompt. and M. 305.

² 4 Maule and S. 261.

³ 4 Bro. C. C. 124; 2 Ves. Jun. 34. pp. 116, 220.

⁴ 4 Madd. 418.

⁵ 1 Sch. and Lef. 5.

⁶ Willes, 98.

⁷ 2 Crompt. and M. 53. See ante.

notwithstanding the hardship of the case, that the will swept away from the widow every shilling of the property; for the birth of a child must necessarily concur in order to constitute an implied revocation.”¹

The courts have not one rule for one individual, and a different rule for another, or one for the rich, and another for the poor.² [“The case of this illustrious person (Comte d’Artois, afterward Charles X of France) must be decided on the same grounds, that would operate in favor of the meanest individual.”³]

It has frequently happened that one of several judges, of whom a court was composed, has declined to give his opinion in a case before the court. He has declined to give it, “for private reasons;”⁴ or “being connected with the parties;”⁵ or “being connected with one of the parties;”⁶ or having, when at the bar, been “counsel in the case,”⁷ “been consulted;”⁸ “concerned,”⁹ or “engaged,”¹⁰ in it. Two out of four judges have declined giving any opinion, “as they had been engaged in the case while at the bar.”¹¹ In an instance of this kind, Lord Ellenborough said, “that only two judges were in a situation to pronounce any judgment, the other two having, when at the bar, been engaged in the case.”¹² One

¹ 4 Maule and S. 12.

² *The King v. Lord Cochrane*, 3 Maule and S. 10.

³ Lord Eldon, *Sinclair v. Charles Phillippe*, 2 B. and P. 363.

⁴ 4 Barn. and Adol. 29.

⁵ 5 Maule and S. 21.

⁶ 5 Durn. and E. 5.

⁷ 1 Barn. and Adol. 615; 2 Barn. and Adol. 385, 445; 1 Brod. and B. 161.

⁸ 6 Barn. and Cr. 585; 3 Barn. and Adol. 10.

⁹ 2 East, 272, 389, 478, 520; 3 East, 245, 393.

¹⁰ 2 Bos. and P. New Rep. 451; 2 East, 555.

¹¹ *Doe dem. Wright v. Jesson*, 5 Maule and S. 103. In this instance, the judgment of the remaining two judges was reversed in the House of Lords. 2 Bligh, 1.

¹² *Doe dem. Earl of Jersey v. Smith*, 5 Maule and S. 475. In this instance, the judgment of the court (King’s Bench) was reversed in the Court of

of several judges, composing a court, has, however, given his opinion in a cause before it, notwithstanding the case had been laid before him when at the bar, and at which time he inclined to an opinion contrary to his judgment now delivered.¹ On one occasion, after the other judges of the Court of King's Bench had given their opinions, Lord Ellenborough observed, that "as he had been concerned in the cause, he had forborne taking any part in the deliberation with the rest of the court; but having now heard their opinions, he must declare his entire concurrence with them in the judgment they had delivered."²

Lord Thurlow refused to hear a cause, on account of the interest his lordship, by virtue of his office, had in the subject. It was heard by the Master of the Rolls; and, on an appeal from his decree to Lord Loughborough, this learned Chancellor also for the same reason declined hearing the cause. His lordship referred the appeal to two judges of the courts of law, Chief Justice Eyre, and Chief Baron M'Donald; and, having received the certificate in affirmation of the decree, Lord Loughborough affirmed the decree.³

[By the Constitution and laws of New York, except in the Court of Appeals, no judge can take part in deciding a question argued when he was not sitting. No judge of an appellate court can take part in deciding a matter determined by him in the court below. And no judge can take part in deciding a case in which he has been counsel, or where he is in-

Exchequer Chamber, but the judgment of the latter court was reversed in the House of Lords, where the judgment of the King's Bench was affirmed. 1 Brod. and B. 97, 3 Moore, 339, 2 Brod. and B. 473, 5 Moore, 332.

¹ 3 Price, 383.

² 2 East, 324.

³ Attorney-General v. Boulton, 2 Ves. Jun. 380, 3 Ves. 220.

terested in the subject-matter, nor can he act as counsel in any suit in which he has acted as judge.¹ "It is the duty of the three judges who heard the argument *to consult together* in relation to the decisions of the questions involved in the motion, in order that each might have the benefit of the views of his brethren, to aid him in arriving at a proper conclusion, and doubtless such consultation was had; it is to be presumed that they discharged *their duty in that respect.*"²

[Lord Mansfield tried the case of a wager upon the sex of the Chevalier D'Eon.³ But Justice Burnet refused to try an action of slander on a lady for saying she had a defect in her person which unfitted her for marriage; the defendant having justified, on the ground of truth. In *Brown v. Leeson*,⁴ the court refused to try an action on a wager respecting the mode of playing an illegal game.]

SECTION VIII.

OF POSTPONING THE DELIVERY OF JUDGMENT.

WHERE the court has no doubt, it may often be its duty to give judgment immediately after the argument of a case. Burrow, in his report of a cause, subjoins to the argument there:—"As this was the first argument, it was expected (as of course) that it would be argued again; but Lord Mansfield gave his opinion

¹ Const. Art. VI. § 8; 2 R. S. 275, §§ 2, 3, laws 1850, ch. xli, § 2; laws 1847, ch. cclxxx, § 81; laws 1847, ch. cccclxx, § 52.

² *Corning v. Slosson*, 16 N. Y. 297.

³ *DaCosta v. Jones*, Cowp. 729.

⁴ 2 H. Bl. 43.

immediately, to the following effect: Lord Mansfield,—‘Where we have no doubt, we ought not to put the parties to the delay and expense of a further argument; nor leave other persons, who may be interested in the determination of a point so general, unnecessarily under the anxiety of suspense.’”¹

Under other circumstances, the court very commonly takes time to consider of its judgment;² as in the instances, where the court assigned these reasons for the postponement:—We are of opinion, “the cause should stand over till next term, that it may be properly considered, this [the matter in the cause] being a point of the utmost consequence:”³ “As this is a matter of very great general importance, it is proper that we should weigh it well before giving any decision:”⁴ “As we are called upon to overrule a solemn decision of this court, we will take time to consider of our judgment:”⁵ “As it is a matter, which affects the proceedings in all the courts, we will confer with the judges of the other courts:”⁶ “We have taken time in this question, as the rules, which affect the conduct of executors, ought to be most seriously considered, because they make precedents in all courts, where the British law extends; and whatever we pronounce will become a general rule in the islands.”⁷ In a cause in chancery, in which Lord Eldon directed a case for the opinion of the Court of Common Pleas, and, not being satisfied with its certificate, his lordship was assisted by Chief Baron Richards, and Mr. Justice Abbott, both of whom differed from the Court

¹ 1 Burr. 5.

² 8 Taunt. 19; 1 Atk. 619.

³ 1 Atk. 40.

⁴ 2 Anstr. 514.

⁵ 1 Barn. and Adol. 199.

⁶ 2 Crompt. and M. 147.

⁷ 2 Cox, 275.

of Common Pleas, Lord Eldon in postponing his judgment said,—“In the anxious office of deciding between the discordant opinions of six most able and learned judges, I think it due to the parties to pause and weigh the reasons on both sides, before I give judgment.”¹

Often a cause is ordered to stand over, to search for precedents;² or “to look into the cases;”³ or into a particular case, or cases, cited;⁴ and sometimes for the purpose of a further argument.⁵ At other times the court delays to pronounce judgment, because a similar case is depending in another court, and the judgment is deferred until the decision of that case.⁶ And, under a circumstance of this kind, a judgment has been postponed, to confer with the judges of the other court. This was done in a cause in the King’s Bench, relative to the construction of a letter of attorney:—“The court said, that though they had no doubt about the case, yet as there was a similar cause (said to be) depending in the Court of Common Pleas on the construction of the same letter of attorney, it would be proper not to decide this case until they had had an opportunity of conferring with the judges of that court on the subject.”⁷ A case in the King’s Bench occurs, which stood over more than four years for the judgment of the court, it being argued in Hilary Term, 1807, when it was directed to stand

¹ *Prebble v. Boghurst*, 1 Swanst. 314, 327.

² 1 Mod. 307; 1 Atk. 40; 3 Atk. 519; 2 Russ. and M. 142.

³ 1 Burr. 347; 4 Durn. and E. 98; 8 Durn. and E. 48; 2 Maule and S. 414; 2 Anstr. 539; 3 Ves. 363.

⁴ 2 Durn. and E. 450; 4 Durn. and E. 98; 4 Bro. C. C. 7; 1 Ves. Jun.

495; 3 Ves. 335, 336; Ambl. ed. Blunt, 837.

⁵ Cowp. 144, 154; 16 East, 268.

⁶ 2 H. Bl. 13; 9 Bing. 429; 2 Ball and B. 577. See also 3 Ves. 300, and 1 Crompt. and M. 81.

⁷ 6 Durn. and E. 593. And see *Pickup v. Wharton*, 2 Crompt. and M. 405, 406.

over for consideration, "in consequence of a writ of error brought upon a judgment in the Court of Common Pleas in a case similar to this, and on the authority of which determination this case was said much to depend." Lord Ellenborough, delivering the judgment of the court in Michaelmas Term, 1811, observed,—“That writ of error was argued and judgment given thereon in the House of Lords after the last Trinity Term: it is therefore fit that judgment in this case should no longer be suspended.” And it may be added, that, in deciding this case, the court relied principally, as on an authority precisely in point, on the case in the House of Lords, the pendency of which was the occasion of its judgment being deferred.¹

In a case, that was an action on a ransom bill, counsel, who was retained for a second argument, offering to make inquiry, in the next vacation, into the practice of France and Holland, the court (Lord Mansfield being one of the judges) allowed the cause to stand over upon the point of that inquiry.²

In another action on a ransom bill, the court wished the case to be spoken to by civilians, Lord Mansfield saying, “We can have no light from our own law.” On a subsequent day, the case was accordingly so argued.³

In several instances in chancery, the court has ordered a cause to stand over, for the purpose of obtaining the opinion of a civilian on a particular question.⁴

A case may be mentioned, where, after the argu-

¹ *Doe v. Moore*, 14 East, 601.

⁴ *Hurst v. Beach*, 5 Madd. 356;

² *Ricord v. Bettenham*, 1 W. Bl. 563.

Cawthorn v. Chalie, 2 Sim. and St. 127; *Fowler v. Richards*, 5 Russ. 39.

³ *Anthon v. Fisher*, 3 Dougl., ed. Frere & R. 166.

ment was closed, the court gave their opinions upon some of the points urged at the bar, and on other points took time to consider of their judgment.¹

On one occasion, after the rest of the court had delivered their judgments, Grose, J., desired to have further time to consider of his opinion.²

It is an observation of Sir T. Clarke,—“There are two things, against which a judge ought to guard,—precipitancy and procrastination. Sir Nicholas Bacon was made to say, which I hope never again to hear, that a speedy injustice is as good as justice which is slow.”³ [In *Van Doren v. Mayor of N. Y.*,⁴ Chancellor Walworth apologizes for his decision in *Meserole v. Mayor of Brooklyn*,⁵ on the ground that, “in the hurry of business,” he overlooked a distinction which he “had recognized and acted upon in other cases.”

[When Littleton prayed judgment in a *quare impedit*, Year Book, Mich. 35 Hen. VI, Prisot, Chief Justice, protested: “I marvel mightily that you are so hasty in this matter; for it is a weighty matter, and I have seen similar matters pending for twelve years, and this matter has been pending only three-quarters of a year.”]

Willes, C. J., commences his judgment in a cause by saying,—“Delaying justice and denying justice are considered as the same thing in Magna Charta. And therefore as I have no doubt in this case, I shall now give my opinion.”⁶

In a cause “of moment,” in which Lord Notting-

¹ The King v. Croft, 3 Barn. and Ald. 171.

² 2 Durn. and E. 371.

³ 1 Dick. 377. Possibly Sir N. Bacon put his saying into practice, in a case, which he decided, but which

Lord Loughborough calls “a strange determination,” and affirms to be “contrary to every principle.” 3 Ves. 70.

⁴ 9 Paige, 389.

⁵ 8 Paige, 199.

⁶ 2 Kenyon, 478.

ham was assisted in chancery by three judges, and, after hearing their opinions, seeing they differed from him, gave himself some time to consider before he took any final resolution, and afterwards permitted counsel to argue the case over again, saying, "for this is a cause that deserves patience;" and when all this was done, he was at the bar desired to consider further of the case; his lordship said,—“I would do so if I could justify it; but expedition is as much the right of the subject, as justice is; and I am bound by *Magna Charta nulli negari, nulli differe justitiam.*”¹

[“It was his (Judge Story’s) habit, after hearing an argument in any case of importance, to defer the investigation of the matter, until his mind had cooled after the excitement of the hearing, and freed itself of all bias produced by the high colorings of the advocate, and the eloquence of his appeals; leaving in his memory only the impressions made by the principal facts and the legal reasonings; of which also he took full notes—after this, he carefully examined all the cases cited and others bearing on the subject, reviewing and fixing firmly in his mind all the principles of law which might govern the case. By the aid of these principles, he proceeded to examine the question on its merits, and to decide accordingly, always first establishing the law in his mind, lest the hardship of the case should lead him to an illegal conclusion.”² This practice was the reverse of that attributed to Ch. J. Pendleton, who first decided in his own mind which party ought to succeed, and then proceeded to look up authorities to support this conclusion.

¹ Duke of Norfolk’s case, 3 Ch. Cas. 1, 14, 37, 52.

² 2 Story’s Life and Letters, 583.

[“In great and important cases,” said Lord Eldon,¹ “I have endeavored to sift all the principles and rules of law to the bottom, for the purpose of laying down, in each new and important case as it arises, something, in the first place, which may satisfy the parties that I have taken pains to do my duty; something, in the second place, which may inform those who, as counsel, are to take care of the interests of their clients, what the reasons are upon which I have proceeded, and may enable them to examine whether justice has been done; and further, something which may contribute towards laying down a rule, so as to save those who may succeed to me in this great situation, much of that labor which I have had to undergo, by reason of cases having been not so determined, and by reason of a due exposition of the grounds of judgment not having been so stated.”

[But what, perhaps, still more raised his (Lord Chancellor Nottingham’s) judicial fame, was the admirable habit he adopted, and which has been revived and recommended by illustrious judges still living—of writing the judgment to be delivered in every case of importance—whereby the judge is forced to apprehend accurately both facts and law; becomes fully acquainted with all difficulties and objections before he has publicly committed himself by any opinion, and lays down and qualifies his positions with more nicety than it is possible for him to do in an extempore speech.”²

[“The faults of Lord Eldon’s judicial style,” says Lord Campbell,³ “are very much to be ascribed to the

¹ Atty. Gen. *v.* Skinner’s Co. 2 Russ. 437.

³ X Lives of the Chan. ch. cxxiii, p. 236.

² IV Camp. Lives of the Chanc. ch. xcii, p. 250.

circumstance, that in delivering his opinions he always extemporized, not even making use of notes. If the advice of an individual so humble as myself could have any weight hereafter, I would most earnestly implore judges in all cases of importance to prepare written judgments. The habit not only insures a minute attention to all the facts of the case, and a calm consideration of the questions of law which they raise, but is of infinite advantage in laying down rules with just precision, and it has a strong tendency to confer the faculty of lucid arrangement and of correct composition. How inferior would Lord Stowell's judgments have been, if blurted out on the conclusion of the arguments at the bar, and taken down by a reporter! Sir William Grant's, hardly inferior in merit, were recited as if the produce of his mind at the moment; but it is now ascertained that they had been carefully written out, revised, and committed to memory. Unless in one or two cases, which Lord Eldon decided by consent of parties after he resigned the Great Seal, he never put pen to paper in preparing his judgments. In consequence, it has been remarked by a severe critic, that 'Lord Eldon's judgments lie, like Egyptian mummies, embalmed in a multitude of artfully-contrived folds and wrappers.'

[The cause, or perhaps the pretext, for Lord Eldon's delays, was a principle on which he professed to act, that it was always his duty to read the bill, answer, deposition, and exhibits, and to consider not only the facts stated and the points made at the bar, but all the facts in the cause, and all the points that might be made on either side. I know, said he, it has been an opinion—a maxim—a principle—ay, an honest principle, on which several of those who have presided in this court have acted, that a judge is

obliged to know nothing more than counsel think proper to communicate to him, relative to the case. But for myself, I have thought and acted otherwise, and I know, yes, I could swear upon my oath, that if I had given judgment on such information and statements only as I have received from counsel on both sides, I should have disposed of numerous estates to persons who had no more title to them than I have ; and believe me that I feel a comfort in that thought, a comfort of which all the observations on my conduct can never rob me.¹

[Lord Campbell² questions the propriety of Lord Eldon's professed judicial habit of not trusting to counsel, and gives his reasons as follows:—"In the first place, it is impossible. In the vast majority of cases which come before a judge, . . . he must take the contents of written documents from the counsel, trusting to their honor and accuracy, and to their reciprocal supervision. Secondly, it would be exceedingly dangerous for a judge to be in the habit of deciding upon facts or points of law of his own discovering ; for if noticed at the bar, they would very likely have been found capable of being easily answered or explained away. Thirdly, such a habit must breed a morbid propensity to doubt, and it holds out a tempting bait to procrastination, by affording a ready excuse for idleness.

["It is the duty of a judge, in grave and difficult cases, to take time to consider ; but it is his duty, as soon as is consistent with due deliberation, to make up his mind and to deliver judgment ; further delay not only unnecessarily prolonging the suspense of the

¹ X Campbell's *Lives of the Chanc.*
ch. cccxiii, p. 229.

² X *Lives of the Chanc.* ch. cccxiii,
p. 232.

parties interested, but rendering the judge less and less qualified to decide rightly, as the facts of the case escape from his recollection, and the impression made upon him by the arguments at the bar is effaced, to say nothing of the double time and labor required from him in vainly trying to make himself master, a second time, of what he once thoroughly understood."¹

[We now proceed to give a decision of Crozier, J., in *Searle v. Adams*,² a style we recommend rather to be avoided than imitated :—

["In this case, the irrepressible Statute of Limitation is again presented for consideration. For some years past, upon the disposition of each succeeding case involving the construction of this statute, it was considered, by bench and bar, that fiction itself could scarcely conceive of a new question to arise thereunder; but as term after term rolls around, there are presented new questions, comparing favorably in point of numbers with Falstaff's men in buckram, thus adding to the legions that have gone before a new demonstration of the propriety and verity of the adage, that 'truth is stranger than fiction.' With the heat of ninety-eight degrees of Fahrenheit in the shade, and the newspapers teeming with reports of the ravages of our great common enemy, who, the more effectually to accomplish his double purpose of capturing the imprudent and frightening the timid, has assumed the form of the Asiatic monster, it might be supposed by the unthinking that the consideration of such questions would be entered upon rather reluctantly. But we beg to disabuse the public mind of any such heresy. Cases might be imagined where 'smashes'

¹ X Lives of the Chanc. ch. ccxiii,
p. 226.

² 3 Banks, 518.

would not stimulate, nor 'cobblers' quicken, nor 'juleps' invigorate; but a new question under our Statute of Limitation, in coolness and restoring power, so far exceeds any and all of these, that, when one is presented, the 'fine ould Irish gentleman's' resurrection under the circumstances detailed in the song becomes as palpable a reality as the 'Topeka Constitution' or 'the territorial capital at Mineola.' The powers of a galvanic battery upon the vital energies are wholly incomparable to it. So that the consideration of this case upon this day of wilted collars and oily butter should not entitle the court to many eulogies for extraordinary energy in the fulfillment of its duties. . . . Counsel was understood to intimate that some mischievously-disposed persons, with a diabolical intent not clearly revealed, while organized as the Legislature of the State, had made a violent and unwarrantable onslaught upon the Constitution—that Constitution which this court, as a tripedal pier, is exerting its utmost endeavors to support—that Constitution which, not only from patriotic and moral, but from alimentary considerations as well, we are bound to maintain and defend. Being in a somewhat 'melting mood' to-day, we would be pleased to gratify counsel by adopting his fears," etc.¹

[The learned justice then goes on to decide the case, and concludes that, "it is as transparent as the soup of which Oliver Twist implored an additional supply," that the case does not come within the statute. If the reader desires a further specimen of Judge Crozier's eloquence, we refer him to his remarks, in *Craft v. The State*, in defending the somewhat obvious proposition, that a jury is not bound, as matter

¹ 3 Banks, 480.

of law, to disbelieve the evidence of a prostitute ; or, to use his own words, that it ought not to be said that a woman “pours out from her heart at Venus’s shrine with her virtue every other good quality with which in our thoughts we endow her sex,” and this “whether she habitually flaunts her frailty in the face of the world, or attempts to hide it in retiracy, or garnish it with garlands of good works.”

[In conclusion, we give another specimen of judicial eloquence :—“And for one, I rejoice to see edifices built, although they may be ‘with the granite of Littleton, the cement of Coke, the trowel of Blackstone, and the masonic genius of a hundred chief justiciaries, and covered with the moss of many generations,’ swaying beneath the sturdy blows so unsparingly applied by the hand of reform.”¹]

SECTION IX.

OF LOOKING FORWARD TO THE CONSEQUENCES OF A JUDGMENT.

A PARTICULAR suit often involves the determination of a general point ; in this point persons, who are not parties to that suit, are interested ; and the court’s decision may produce general or public inconvenience.² In such cases, therefore, a duty of a court is, to look forward to the consequences, which may result from its decision.³ Lord Redesdale, speaking of a case before him, says,—“In all cases of this sort, we should look a great deal more at the consequences, as they may affect other parties, than at the parties in the par-

¹ Lumpkin, J., 7 Geo. R. 19.

593 ; 2 Brod. and B. 506, 507, 597.

² 1 Burr. 5, 6 ; 8 Durn. and E. 592, See *ante*, p. 213, 214.

³ 7 Taunt. 496.

ticular cause; and it is very difficult to consider a case properly in a court of justice, if the particular circumstances be its sole object; we must look to those general rules and principles, which shall guide the conduct of other persons, and enable the court to administer justice.”¹ And, in a cause in the House of Lords, Lord Eldon observed,—“It is not sufficient to consider merely the rights of those, who are immediately interested in this case. . . . We are bound to look at this case, with a view to its effect upon the interests of all other persons.”² And in the Court of Chancery the same learned judge has said,—“There is one consideration, of which this court should never lose sight in every decision which it makes, viz., what is to be the effect of its determination, not in the existing case alone, but upon subsequent similar cases; that a decision, founded on misapprehension, may not be applied as a principle to cases of the same class, which may hereafter arise.”³

Inconveniences, that have arisen from a particular decision, have occasioned the following observations:—“I strongly felt at the argument,” says Lord Eldon, in a bankruptcy case, “that if they, who decided *Ex parte Crisp*,⁴ had been aware of the inconveniences, that decision would occasion, it would not have been so decided.”⁵ And a remark of Chief Justice Abbott is,—“I cannot help thinking, that if Lord Kenyon had anticipated the consequences, which have followed from the rule laid down by him in *Lawson v. Weston*,⁶ he would have paused before he pronounced that decision.”⁷

¹ 1 Sch. and Lef. 192.

⁵ Buck, 10, 11.

² 1 Dow and Cl. 297.

⁴ 4 Espin. 56.

³ 2 Glyn and J. 178.

⁷ 3 Barn. and Cr. 471.

⁴ 1 Atk. 133.

["The case, perhaps, may be hard, but the law has made it so . . . So is the law; and the alteration, if desirable, is the proper work of the legislature only."¹ "We are told by the defendant's counsel that the conclusion at which we have arrived would disturb many titles. If that be so, we cannot help it; . . . we have no choice but to redress injuries when they are judicially brought before us." ² *Fiat justitia ruat cælum*, said Lord Mansfield, in Somerset's case³ (A.D. 1772). The phrase is not original with his lordship; it appears in Ward's Simple Cobbler of Aggawam, first published (A. D. 1745).

[The case of Margate Pier Company v. Harman⁴ was decided mainly on the argument *ab inconvenienti*. In Ring v. Mott,⁵ it is said,—“The court must be governed by the exercise of its discretion by what it is apparent will be the consequences.” “To hold otherwise would be to disturb and unsettle a vast number of titles within this State; which is a consideration entitled to much weight in giving the act an interpretation.”⁶]

¹ Lord Chancellor Talbot, Heard v. Stamford, Cas. Temp. Talbot, 173.

² Brohson, J., Sharp v. Shear, 4 Hill, 91.

³ Lofft. 17.

⁴ 3 Barn. and Ald. 266.

⁵ 2 Sandf. 684.

⁶ Lynch v. Livingston, 6 N. Y. 432.

APPENDIX.

APPENDIX.

I.

ARCHDEACON PALEY'S ACCOUNT OF THE CAUSES OF THE NUMEROUS UNCERTAINTIES AND DIFFICULTIES ARISING IN THE ADMINISTRATION OF JUSTICE.*

To a mind revolving the subject of human jurisprudence, there frequently occurs this question : *Why, since the maxims of natural justice are few and evident, do there arise so many doubts and controversies in their application ?* Or, in other words, how comes it to pass, that although the principles of the law of nature be simple, and for the most part sufficiently obvious, there should exist, nevertheless, in every system of municipal laws, and in the actual administration of relative justice, numerous uncertainties, and acknowledged difficulty ? Whence, it may be asked, so much room for litigation, and so many subsisting disputes, if the rules of human duty be neither obscure nor dubious ? If a system of morality, containing both the precepts of revelation and the deductions of reason, may be comprised within the compass of one moderate volume ; and the moralist be able, as he pretends, to describe the rights and obligations of mankind, in all the different relations they may hold to one another ; what need of those codes of positive and particular institutions, of those tomes of statutes and reports, which require the employment of a long life even to peruse ? And this question is immediately connected with the argument which has been discussed in the preceding paragraph : for, unless there be found some greater uncertainty in the law of nature, or what may be called natural equity, when it comes to be applied to real cases and to actual adjudication, than what appears in the rules and principles of the science, as delivered in the writings of those

* Moral and Political Philosophy, book VI, c. viii.

who treat of the subject, it were better that the determination of every cause should be left to the conscience of the judge, unfettered by precedents and authorities; since the very purpose for which these are introduced, is to give a certainty to judicial proceedings, which such proceedings would want without them.

Now, to account for the existence of so many sources of litigation, notwithstanding the clearness and perfection of natural justice, it should be observed, I. That *treatises of morality always suppose facts to be ascertained; and not only so, but the intention likewise of the parties to be known, and laid bare.* For example: when we pronounce that promises ought to be fulfilled in that sense in which the promiser apprehended, at the time of making the promise, the other party received and understood it; the apprehension of one side, and the expectation of the other, must be discovered, before this rule can be reduced to practice, or applied to the determination of any actual dispute. Wherefore, the discussion of facts which the moralist supposes to be settled, the discovery of intentions which he presumes to be known, *still remain to exercise the inquiry* of courts of justice. And as these facts and intentions are often to be inferred, or rather conjectured, from *obscure indications*, from *suspicious testimony* or from a *comparison of opposite and contending probabilities*, they afford a never failing supply of doubt and litigation. For which reason, the science of morality is to be considered rather as a *direction* to the parties who are CONSCIOUS of *their own thoughts and motives and designs*, to WHICH CONSCIOUSNESS *the teacher of morality* constantly appeals, than as a guide to the judge, or to any third person, whose arbitration must proceed upon rules of evidence, and maxims of credibility, *with which the moralist has no concern.*

II. There exist a multitude of cases, in which the law of nature, that is, the law of public expediency, *prescribes nothing*, except that SOME CERTAIN RULE be adhered to, and that the rule actually established, be preserved; it either being indifferent what rule obtains, or, out of many rules, no one being so much more advantageous than the rest, as to recom-

pense the inconveniency of an alteration. In all SUCH cases, *the law of nature* sends us to the LAW of the LAND. She directs that either some fixed rule be introduced by an act of the legislature, or that the rule which accident, or custom, or common consent hath already established, be steadily maintained. Thus, in the descent of lands, or the succession to personals from intestate proprietors, whether the kindred of the grandmother, or of the great grandmother, shall be preferred in the succession ; whether the degrees of consanguinity shall be computed through the common ancestor, or from him ; whether the widow shall take a third or a moiety of her husband's fortune : whether sons shall be preferred to daughters, or the elder to the younger ; whether the distinction of age shall be regarded amongst sisters, as well as brothers ; *in these*, and in a great variety of questions which the same subject supplies, *the law of nature determines nothing*. The only answer she returns to our inquiries is, that some certain and general rule be laid down by public authority ; be obeyed when laid down ; and that the quiet of the country be not disturbed, nor the expectation of heirs frustrated, by capricious innovations. This silence or neutrality of the law of nature, which we have exemplified in the case of intestacy, holds concerning a great part of the questions that relate to the right of acquisition of property. Recourse then must necessarily be had to statutes, or precedents, or usage, *to fix what the law of nature has left loose*. The interpretation of these statutes, the search after precedents, the investigation of customs, compose therefore an unavoidable, and at the same time a large and intricate portion of forensic business. Positive constitutions or judicial authorities are, in like manner, wanted to give precision to many things which are in their nature *indeterminate*. The age of legal discretion ; at what time of life a person shall be deemed competent to the performance of any act which may bind his property ; whether at twenty, or twenty-one, or earlier, or later, or at some point of time between these years, can be ascertained only by a positive rule of the society to which the party belongs. *The line has not been drawn by nature* ; the human understanding advancing to maturity by insensible degrees, and its progress

varying in different individuals. Yet it is necessarily, for the sake of mutual security, that a precise age be fixed, and that what is fixed be known to all. It is on these occasions that the intervention of law supplies the inconstancy of nature. Again, there are other things which are perfectly *arbitrary*, and capable of no certainty but what is given to them by positive regulation. It is fit that a limited time should be assigned to the defendants, to plead to the complaints alleged against them; and also that the default of pleading within a certain time should be taken for a confession of the charge; but to how many days or months that term should be extended, though necessary to be known with certainty, cannot be known to all by any information which the law of nature affords. And the same remarks seem applicable to almost all those rules of proceeding which constitute what is called the practice of the court; as they cannot be traced out by reasoning, they must be settled by authority.

III. In contracts, whether express or implied, which involve a great number of conditions; as in those which are entered into between masters and servants, principals and agents; many also of merchandise, or of works of art; some likewise which relate to the negotiation of money or bills, or to the acceptance of credit or security: the original design and expectation of the parties was, that both sides should be guided by the course and custom of the country in transactions of the same sort. Consequently, when these contracts come to be disputed, natural justice can only refer to that custom. But as such customs are not always sufficiently uniform or notorious, but often to be collected from the production and comparison of instances and accounts repugnant to one another; and each custom being only that, after all, which amongst a variety of usages seems to predominate; we have here also ample room for doubt and contest.

IV. As the law of nature, founded in the very construction of human society, which is formed to endure through a series of perishing generations, requires that the just engagements a man enters into should continue in force beyond his own life; it follows that *the private rights of persons frequently depend*

upon what has been transacted, in times remote from the present by their ancestors or predecessors, by those under whom they claim, or to whose obligations they have succeeded. Thus the questions which usually arise between lords of manors and their tenants, between the king and those who claim royal franchises, or between them and the persons affected by these franchises, depend upon the terms of the original grant. In like manner, every dispute concerning tithes, in which an exemption or composition is pleaded, depends upon the agreement which took place between the predecessor of the claimant and the ancient owner of the land.* The appeal to these grants and agreements is dictated by natural equity, as well as by the municipal law; but concerning the existence, or the conditions, of such old covenants, doubts will perpetually occur, to which the law of nature affords no solution. The loss or decay of records, the perishableness of living memory, the corruption and carelessness of tradition, all conspire to multiply uncertainties upon this head; what can not be produced or proved, must be left to loose and fallible presumption. Under the same head may be included another topic of altercation:—the tracing out of boundaries, which time, or neglect, or unity of possession, or mixture of occupation, has confounded or obliterated. To which should be added, a difficulty which often presents itself in disputes concerning rights of *way*, both public and private, and of those easements which one man claims in another man's property; namely, that of distinguishing, after a lapse of years, *the use of an* INDULGENCE from the *exercise of a right*.

V. The *quantity* or *extent* of any *injury*, even when the cause and author of it are known, is often dubious and undefined. If the injury consists in the loss of some specific right, the value of the right measures the amount of the injury; but

* It may be as well here to apprise the student, of the grand legislative operation recently effected for commuting the tithes of every parish into a rent charge, the amount of which is to be adjusted annually according to the average price of corn. See stat. 6 and 7 Will. IV, ch. lxxi, amended by several subsequent statutes.

what a man may have suffered in his person, from an assault ; in his reputation, by slander ; or in the comfort of his life, by the seduction of a wife or daughter ; or what sum of money shall be deemed a reparation for damages such as these ; can not be ascertained by any rules which the law of nature supplies. The law of nature commands that reparation be made ; and adds to her command, that, when the aggressor and the sufferer disagree, the damage be assessed by authorized and indifferent arbitrators. Here, then, recourse must be had to courts of law, not only with the permission, but in some measure by the direction of natural justice.

VI. When controversies arise in the interpretation of written laws, they, for the most part, arise upon *some contingency which the composer of the law did not foresee or think of*. In the adjudication of such cases, this dilemma presents itself : if the laws be permitted to operate only upon the cases which were actually contemplated by the law-makers, they will always be found defective : if they be extended to every case to which the reasoning, and spirit, and expediency of the provision seem to belong, without any further evidence of the intention of the legislature, we shall allow to the judges a liberty of applying the law, which will fall very little short of the power of making it. If a literal construction be adhered to, the law will often fail of its end ; if a loose and vague exposition be admitted, the law might as well have never been enacted ; for this license will bring back into the subject all the discretion and uncertainty which it was the design of the legislature to take away. Courts of justice are, *and always must be*, embarrassed by these opposite difficulties ; and as it never can be known beforehand, in what degree either consideration may prevail in the mind of the judge, there remains an unavoidable cause of doubt, and a place for contention.

VII. The deliberations of courts of justice upon every new question are encumbered with additional difficulties, in consequence of the authority which the judgment of the court possesses, as a PRECEDENT to future judicatures ; which

authority appertains not only to the conclusions the court delivers, but to the principles and arguments upon which they are built. The view of this effect makes it necessary for a judge to look beyond the case before him ; and, beside the attention he owes to the truth and justice of the cause between the parties, to reflect whether the principles, and maxims, and reasonings, which he adopts and authorizes, can be applied with safety to all cases which admit of a comparison with the present. The decision of the cause, were the effects of the decision to stop there, might be easy ; but the consequence of establishing the principle which such a decision assumes, may be difficult, though of the utmost importance to be foreseen and regulated.

VIII. After all the certainty and rest that can be given to points of law, either by the interposition of the legislature, or the authority of precedents, one principal source of disputation, and into which, indeed, the greater part of legal controversies may be resolved, will remain still, namely, "*the competition of opposite analogies.*" When a point of law has been once adjudged, neither that question, nor any which completely, and in all its circumstances, corresponds with *that*, can be brought a second time into dispute ; but questions arise which resemble this, only indirectly and in part, in certain views and circumstances, and which may seem to bear an equal or a greater affinity to other adjudged cases : questions which can be brought within any fixed rule only by analogy, and which hold a relation by analogy to different rules. *It is by the urging of the different analogies that the contention of the bar is carried on ;* and it is in the comparison, adjustment, and reconciliation of them with one another ; in the discerning of such distinctions ; and in the framing of such a determination as may either save the various rules alleged in the cause, or, if that be impossible, may give up the weaker analogy to the stronger ; that the sagacity and wisdom of *the court* are seen and exercised. Amongst a thousand instances of this, we may cite one of general notoriety, in the contest that has lately been agitated concern-

ing literary property.* The personal industry which an author expends upon the composition of his work bears so near a resemblance to that by which every other kind of property is earned, or deserved, or acquired ; or rather, there exists such a correspondency between what is created by the study of a man's mind, and the production of his labor, in any other way of applying it, that he seems entitled to the same exclusive, assignable, and perpetual right in both ; and that right to the same protection of law. This was the analogy contended for on one side. On the other hand, a book, as to the author's right in it, appears similar to an invention of art, as a machine, an engine, a medicine ; and since the law permits these to be copied or imitated, except where an exclusive use or sale is reserved to an inventor by patent, the same liberty should be allowed in the publication and sale of books. This was the analogy maintained by the advocates of an open trade. And the competition of these opposite analogies constituted the difficulty of the case, as far as the same was argued or adjudged, upon principles of common law. One example may serve to illustrate our meaning, but whoever takes up a volume of Reports will find most of the arguments it contains capable of the same analysis ; although the analogies, it must be confessed, are sometimes so entangled as not to be easily unraveled, or even perceived.

Doubtful and obscure points of law are not, however, nearly so numerous as they are apprehended to be. Out of the multitude of causes which, in the course of each year, are brought to trial in the metropolis or upon the circuits, they are few in which any point is reserved for the judgment of superior courts. Yet these few contain all the doubts with which the law is chargeable ; *for, as to the rest*, the uncertainty, as hath been shown above, is not in the law, *but in the means of human information*.

* Paley is here alluding to the famous case of *Miller v. Taylor*, reported in 4 Burrow's Rep. 2303, which was argued in the year 1769.

II.

ESSAY ON JUDICATURE, BY LORD BACON.

JUDGES ought to remember that their office is "*jus dicere*," and not "*jus dare*;" to interpret law, and not to make law or give law; else will it be like the authority claimed by the Church of Rome, which, under pretext of exposition of Scripture, doth not stick to add and alter, and to pronounce that which they do not find, and, by show of antiquity, to introduce novelty. Judges ought to be more learned than witty, more reverend than plausible, and more advised than confident. Above all things, integrity is their portion, and proper virtue. "Cursed (saith the law) * is he that removeth the landmark." The mislayer of a mere stone is to blame; but it is the unjust judge that is the capital remover of landmarks, when he defineth amiss of lands and property. One foul sentence doth more hurt than many foul examples; for these do but corrupt the stream, the other corrupteth the fountain; so saith Solomon, "*Fons turbatus et vena corrupta est justus cadens in causa sua coram adversario.*" †

The office of judges may have reference unto the parties that sue, unto the advocates that plead, unto the clerks and ministers of justice underneath them, and to the sovereign or state above them.

First, for the causes or parties that sue. "There be (saith the Scripture) that turn judgment into wormwood;" ‡ and surely there be, also, that turn it into vinegar; for injustice maketh it bitter, and delays make it sour. The principal

* The Mosaic law. He alludes to Deuteronomy, xxvii, 17: "Cursed be he that removeth his neighbor's landmark."

† "A righteous man falling down before the wicked, is as a troubled fountain and a corrupt spring."—*Proverbs*, xxv, 26.

‡ "Ye who turn judgment to wormwood, and leave off righteousness in the earth."—*Amos*, v, 7.

duty of a judge is to suppress force and fraud; whereof force is the more pernicious when it is open, and fraud when it is close and disguised. Add thereto contentious suits, which ought to be spewed out, as the surfeit of courts. A judge ought to prepare his way to a just sentence, as God useth to prepare his way, by raising valleys and taking down hills; so when there appeareth on either side, a high hand, violent prosecution, cunning advantages taken, combination, power, great counsel, then is the virtue of a judge seen to make inequality equal, that he may plant his judgment as upon an even ground. "*Oqui fortiter emungit, elicit sanguinem*;"* and where the wine-press is hard wrought, it yields a harsh wine that tastes of the grape-stone. Judges must beware of hard construction and strained inferences; for there is no worse torture than the torture of laws. Especially in case of laws penal, they ought to have care that that which is meant for terror be not turned into rigor; and that they bring not upon people that shower whereof the Scripture speaketh, "*Pluet super eos laqueos*;"† for penal laws pressed,‡ are a shower of snares upon the people. Therefore let penal laws, if they have been sleepers of long, or if they be grown unfit for the present time, be by wise judges confined in the execution: "*Judicis officium est, ut res, ita tempora rerum*,"§ &c. In causes of life and death, judges ought (as far as the law permitteth) in justice to remember mercy, and to cast a severe eye upon the example, but a merciful eye upon the person.

Secondly, for the advocates and counsel that plead. Patience|| and gravity of hearing is an essential part of justice,

* "He who wrings the nose strongly brings blood."—*Proverbs*, xxx, 33. "Surely, the churning of milk bringeth forth butter, and the wringing of the nose bringeth forth blood; so the forcing of wrath bringeth forth strife."

† "He will rain snares upon them."—*Psalms*, xi, 6. "Upon the wicked he shall rain snares, fire, and brimstone, and a horrible tempest."

‡ Strained.

§ "It is the duty of a judge to consider not only the facts, but the circumstances of the case."—*Ovid Arist.* I, i, 37.

|| Pliny the younger, Ep. B. 6, E. 2, has the observation: "*Patienti-*

and an overspeaking judge is no well-tuned cymbal. It is no grace to a judge first to find that which he might have heard in due time from the bar; or to show quickness of conceit in cutting off evidence or counsel too short, or to prevent information by questions, though pertinent. The parts of a judge in hearing are four: to direct the evidence; to moderate length, repetition, or impertinency of speech; to recapitulate, select, and collate the material points of that which hath been said; and to give the rule or sentence. Whatsoever is above these is too much, and proceedeth either of glory, and willingness to speak, or of impatience to hear, or of shortness of memory, or of want of a staid and equal attention. It is a strange thing to see that the boldness of advocates should prevail with judges; whereas, they should imitate God, in whose seat they sit, who represseth the presumptuous, and giveth grace to the modest; but it is more strange, that judges should have noted favorites, which cannot but cause multiplication of fees, and suspicion of by-ways. There is due from the judge to the advocate some commendation and gracing, where causes are well handled and fair pleaded, especially towards the side which obtaineth not; * for that upholds in the client the reputation of his counsel, and beats down in him the conceit † of his cause. There is likewise due to the public a civil reprehension of advocates, where there appeareth cunning counsel, gross neglect, slight information, indiscreet pressing, or an over-bold defence; and let not the counsel at the bar chop ‡ with the judge, nor wind himself into the handling of the cause anew after the judge hath declared his sentence; but, on the other side, let not the judge meet the cause half way, nor give occasion to the party to say, his counsel or proof were not heard.

Thirdly, for that that concerned clerks and ministers. The place of justice is a hallowed place; and, therefore, not only

am . . . que pars magna justitiæ est;” “Patience, which is a great part of justice.”

* Is not successful.

† Makes him to feel less confident of the goodness of his cause.

‡ Altercate, or bandy words with the judge.

the bench, but the foot-place; and precincts, and purprise thereof, ought to be preserved without scandal and corruption; for, certainly, "Grapes (as the Scripture saith) will not be gathered of thorns or thistles;" * neither can justice yield her fruit with sweetness amongst the briers and brambles of catching and polling† clerks and ministers. The attendance of courts is subject to four bad instruments; first, certain persons that are sowers of suits, which make the court swell, and the country pine; the second sort is of those that engage courts in quarrels of jurisdiction, and are not truly "*amici curiæ*," ‡ but "*parasiti curiæ*," § in puffing a court up beyond her bounds for their own scraps and advantage; the third sort is of those that may be accounted the left hands of the court; persons that are full of nimble and sinister tricks and shifts, whereby they pervert the plain and direct courses of courts, and bring justice into oblique lines and labyrinths; and the fourth is the poller and exacter of fees; which justifies the common resemblance of the courts of justice to the bush, whereunto while the sheep flies for defence in weather, he is sure to lose part of his fleece. On the other side, an ancient clerk, skillful in precedents, wary in proceeding, and understanding in the business of the court, is an excellent finger of a court, and doth many times point the way to the judge himself.

Fourthly, for that which may concern the sovereign and estate. Judges ought, above all, to remember the conclusion of the Roman Twelve Tables, "*Salus populi suprema lex*;" ¶

* "Do men gather grapes of thorns, or figs of thistles."—*St. Matthew*, vii, 16.

† Plundering.

‡ "Friends of the court."

§ "Parasites," or "flatterers of the court."

¶ "The safety of the people is the supreme law" But Mr. Justice Burrough said: "Public policy is an unruly horse, which if a judge unwarily mount, ten to one he is run away with." As to a judge courting popularity, it will be remembered that when Lord Mansfield was charged with desiring popularity, he confessed the charge, adding: "But it is that popularity which follows, not that which is run after; it is that popularity which, sooner or later, never fails to do justice to the pursuit of noble ends by noble means." *Rex v. Wilkes*, 4 Burr. 2562.

and to know that laws, except they be in order to that end, are but things captious, and oracles not well inspired: therefore it is a happy thing in a state, when kings and states do often consult with judges; and again, when judges do often consult with the king and state: the one, when there is matter of law intervenient in business of state; the other, when there is some consideration of state intervenient in matter of law; for many times the things deduced to judgment may be "*meum*" * and "*tuum*," † when the reason and consequence thereof may trench to point of estate. I call matter of estate not only the parts of sovereignty, but whatsoever introduceth any great alteration, or dangerous precedent, or concerneth manifestly any great portion of people; and let no man weakly conceive, that just laws and true policy have any antipathy, for they are like the spirits and sinews, that one move with the other. Let judges also remember, that Solomon's throne was supported by lions ‡ on both sides; let them be lions, but yet lions under the throne, being circumspect that they do not check or oppose any points of sovereignty. Let not judges also be so ignorant of their own right, as to think there is not left to them, as a principal part of their office, a wise use and application of laws; for they may remember what the apostle saith of a greater law than theirs: "*Nos scimus quia lex bona est, modo quis eâ utatur legitime.*" §

To the foregoing may appropriately be appended the following extract from the speech of Lord Bacon upon the occasion of Mr. Justice Hutton taking his oath of office as a Justice of the Common Pleas. ||

And therefore it is proper for you, by all means, with

* "*Mine.*"

† "*Yours.*"

‡ He alludes to 1 *Kings*, x, 19, 30: "The throne had six steps, and the top of the throne was round behind; and there were stays on either side on the place of the seat, and two lions stood beside the stays—and twelve lions stood there on the one side and on the other upon the six steps." The same verses are repeated in 1 *Chronicles*, ix, 18, 19.

§ "We know that the law is good, if a man use it lawfully."—1 *Timothy*, i, 8.

|| See this referred to, Campbell's reports of Taney's decisions, p. 618.

your wisdom and fortitude, to maintain the laws of the realm : wherein, nevertheless, I would not have you headstrong, but heartstrong ; and to weigh and remember with yourself, that the twelve judges of the realm are as the twelve lions under Solomon's throne : they must show their stoutness in elevating and bearing up the throne. To represent unto you the lines and portraitures of a good judge :

The first is, that you should draw your learning out of your books, not out of your brain.

2. That you should mix well the freedom of your own opinion with the reverence of the opinion of your fellows.

3. That you should continue the studying of your books, and not to spend on upon the old stock.

4. That you should fear no man's face, and yet not turn stoutness into bravery.

5. That you should be truly impartial, and not so as men may see affection through fine carriage.

6. That you should be a light to jurors to open their eyes, but not a guide to lead them by the noses.

7. That you affect not the opinion of pregnancy and expedition by an impatient and catching hearing of the counsellors at the bar.

8. That your speech be with gravity, as one of the sages of the law ; and not talkative, nor with impertinent flying out to show learning.

9. That your hands, and the hands of your hands, I mean those about you, be clean, and uncorrupt from gifts, from meddling in titles, and from serving of turns, be they of great ones or small ones.

10. That you contain the jurisdiction of the court within the ancient merestones, without removing the mark.

11. Lastly, that you carry such a hand over your ministers and clerks, as that they may rather be in awe of you, than presume upon you.

III.

ON THE PROPRIETY OF COURTS, AND PARTICULARLY COURTS OF LAST RESORT, ADHERING TO THEIR OWN DECISIONS.

ON this subject, Bradish, President of the Court of Errors, New York, in deciding *Hanford v. Artcher*,* remarked :

And although the doctrine of the case of *Doane v. Eddy*, more fully developed in *Randall v. Cook*, and still more explicitly declared in *Butler v. Van Wyck*, has been adhered to by two of the judges of the Supreme Court, down through all the subsequent cases of *Stoddard v. Butler*, *Smith & Hoe v. Acker*, *Cole & Thurman v. White*, *Butler v. Van Wyck*, and the case now under review here, yet the doctrine of this court may be considered as now finally settled and established ; and, as such, has become the law of the State. That doctrine is clearly and well laid down in the dissenting opinion of Nelson, Ch. J., in *Doane v. Eddy*, in the Supreme Court ; generally in the opinions of Senators Dickinson and Verplanck in *Stoddard v. Butler*, and in the cases of *Smith & Hoe v. Acker* and *Cole & Thurman v. White*, in this court. In those cases, I think the statute has been correctly interpreted, and the law well settled. That law, until changed, is binding upon this, as it is upon the subordinate courts, and the people of this State. It should, therefore, *here* at least, be vigilantly and firmly sustained. To this *we*, at all events, should faithfully adhere. This has become the more necessary, and is the more incumbent upon us, since, for the first time in the history of this court, its controlling powers are drawn into question, and the authority of its decisions denied. If this doctrine, so novel and alarming in itself, had been only casually or carelessly expressed, or had had a humbler origin, it would have carried with it less weight, and would

*4 Hill, 321.

of course be less dangerous. Grave even as it is in its character and tendency, still, under ordinary circumstances, it might safely be left to the sure corrective of sound and enlightened public opinion. But the high personal character, and elevated official station of the individual from whom it emanates, as well as the labored and apparently deliberate manner in which it is put forth, are all calculated to give to this new doctrine a credit and currency, which in itself it could never have; and to aggravate the mischiefs it naturally tends to produce. It ought not, therefore, to pass in silence here. Some notice of it seems to be not merely called for, but forced upon the members of this court, by the highest considerations of public duty, and a just regard for the character and usefulness of the court of which we are members. So long as I have the honor of being a member of this court, my sense of duty will not permit me to allow even my silence to be construed into an acquiescence in a doctrine that would abridge the legitimate powers, degrade the character, and impair the usefulness of this court; a doctrine, too, which I deem as unconstitutional in its principle, and as disorganizing and destructive in its tendency as it is novel in its enunciation.

The people, in forming the organic law of the government of this State, very wisely foresaw that, in its action and progress, questions of interpretation, of the settlement of legal principles, and of their application, would frequently arise; and thence the necessity of constituting some tribunal, with general appellate and supervisory powers, whose decisions should be final, and conclusively *settle* and *declare* the law. This was supposed to have been accomplished in the organization of this court. Heretofore this court, under the Constitution, has been looked to by the people as the tribunal of last resort in the State; and it has hitherto been supposed, that when this court had decided a case upon its merits, such decision not only determined the rights of the parties litigant in that particular case, but that it also settled the principles involved in it, as *permanent rules of law*, universally applicable in all future cases embracing similar facts, and involving the same or analogous principles. These decisions thus be-

came at once public law, measures of private right, and landmarks of property. They determined the rights of persons and of things. Parties entered into contracts with each other with reference to *them* as to *the declared and established law*; law equally binding upon the courts and the people. But the doctrine recently put forth would at once overturn this whole body of law founded upon the adjudications of this court, built up as it has been by long-continued and arduous labors, grown venerable with years, and interwoven as it has become with the interests, the habits, and the opinions of the people. Under this new doctrine all would again be unsettled—nothing established. Like the ever returning but never ending labors of the fabled Sisyphus, this court, in disregard of the maxim of "*stare decisis*," would, in each recurring case, have to enter upon its examination and decision as if all were new, without any aid from the experience of the past, or the benefit of any established principle or settled law. Each case, with its decision being thus limited *as law* to itself alone, would in turn pass away and be forgotten, leaving behind it no record of principle established, or light to guide, or rule to govern the future.

Such is the condition to which this novel doctrine, if practically adopted, would reduce us—a condition which a former distinguished member of this court, borrowing the language of an ancient writer, well and forcibly described as marking a miserable people, "*where the laws are vague and uncertain*." But there is another aspect of this novel doctrine which seems to me still more alarming and destructive. It is said that "it would be strange indeed if other courts were bound to follow them [the decisions of this court] at all events, and *without looking into the reasons* on which they stand." Again, "the decisions of that court [the Court of Errors], although final as between the parties litigant, are so far from being conclusive by way of authority, that they are entitled to much less weight than the judgments of those courts which consider themselves bound by legal adjudications."

To see the Supreme Court engaged in passing in review a decision of this court, in order, by an examination of its

“reasons,” to ascertain whether it will adopt its principle as a rule of law, would certainly be a very novel spectacle. This would be reversing the order of proceeding contemplated by the Constitution. But suppose this, however disorderly it may appear, to be attempted, let us see what would be its practical result. This court decides a case between A. and B. The Supreme Court has a case before it between C. and D. analogous in its facts and principles. The Supreme Court takes up the decision of this court, reviews its reasons, finds them unsatisfactory, and comes to the conclusion that the decision is bad law, or rather, that “it is no law at all;” and, of course, not binding as an authoritative precedent. The court, therefore, proceeds to decide the case in hand in opposition to it. The case is then brought up to this court by writ of error. This court, following its own precedent laid down in the case of A. and B., reverses the judgment of the Supreme Court in the case of C. and D.; and this, even according to this new doctrine, is binding and conclusive between the parties litigant. Now, what has been accomplished by the Supreme Court thus refusing to acknowledge as a precedent the decision of this court in the case of A. and B., and to apply it *as a rule of law* in its own decision of that case of C. and D. ? Literally nothing, except to subject the parties to increased expense, and to illustrate the absolute futility of a doctrine as impracticable in its purpose as it is unconstitutional in its principle, and disorganizing in its tendency and effect. Extend this novel doctrine to the subordinate courts, and what would be the spectacle there presented, and the consequences that would inevitably follow ? The Circuit Courts and Courts of Common Pleas, instead of receiving and following as authoritative precedents the decisions of the Supreme Court, acquiesced in by the parties, would be occupied in reviewing those decisions, examining their *reasons*, and either recognizing or rejecting the former as they find the latter satisfactory or otherwise. The justices of the peace, too, and their courts, would be similarly occupied in regard to the decisions of the Courts of Common Pleas; and thus the subordinate courts generally, released from the controlling and conservative prin-

ciple to which they have very wisely been subjected by the Constitution and the laws, would, under this new doctrine, instead of forming, as at present, dependent parts of one harmonious whole, become not only wholly independent of each other, but conflicting in their powers and their actions. The authority of law and the Constitution would thus be subverted, the course of things reversed and retrograde, and everything tend to disorder, confusion, and ruin.

Again, it is said that the decisions of this court "are so far from being conclusive by way of authority, that they are entitled to much less weight than the judgments of those courts which consider themselves bound by legal adjudications." Now this is a very pregnant proposition; and, if well founded, is as *grave* as it is *disparaging*. Without hazarding the assertion, it would imply *that this court does not consider itself bound by legal adjudications*; an implication as unjust to the character of this court, as it is believed to be wholly unsustained by anything to be found either in the declarations or the acts of this court as such. On the contrary, it is confidently believed that our books of reports will furnish abundant evidence that this court has, in general, adhered to acknowledged authority with as much steadiness and uniformity as others, and much more so than could have been reasonably anticipated from its constitutional organization. Few cases can be found where, by its decisions, it has either overturned or disregarded the well settled principles and rules of law.

But it is said that this court has not *always* followed its own decisions. What other court in any country has done so? The Supreme Court of our own State does not certainly form an exception to the general truth in this respect. Even the history of the leading principle of the very case now under review here, furnishes abundant evidence that neither in England, nor in this country, have the courts *invariably* held the same doctrine upon the same subject. It is, however, confidently believed that this court, in its adjudications, has not been wanting in a due and just respect for acknowledged authority, in a uniform and proper regard for its own deci-

sions, and a careful and strict adherence to well established law.

But the author of this novel doctrine, in the case in which it is put forth, after denying generally the authority of the decisions of this court, has permitted himself to say: "But when, as in *Smith & Hoe v. Acker*, *the court has professedly departed from the whole course of decisions*, the judgment is entitled to no weight at all." To seize upon isolated and casual expressions of individual members of the court, and apply them, as general and governing principles, even to the individual opinions of such members, is of more than questionable fairness; but to appropriate them generally, and say that "*the court has professedly departed from the whole course of decisions*," is as incorrect in point of fact, as it is grossly unjust to this court. In point of fact, it may be asked *when* and *where* did this court, as such, ever make such a profession? The injustice of the remark will be fully illustrated by a reference to the practice of this court, in forming and pronouncing its decisions. The court hears an argument in a given case. It does not afterwards meet for the purpose of consultation or deliberation; but each member, separately and apart, examines the case, and prepares for its decision. The court then comes together; the opinions of the members are delivered; and the court then unites in a general conclusion, either of *affirmance* or *reversal* of the judgment or decree reviewed. For this conclusion, and for this only, is the court, as such, responsible; unless, indeed—which is very rarely the case—the court proceed, by resolution, to declare the grounds upon which that general conclusion rests. Different minds arrive at this conclusion by different processes of reasoning; but no member is answerable either for the *reasons* or the *language* of any other member. Each is responsible only for his own, and for the general conclusions and resolutions in which, by his express votes, he may have united. The gross injustice, therefore, as well as inaccuracy in point of fact, of this statement as to what *this court professed* in the case of *Smith & Hoe v. Acker*, is too manifest to require further illustration or remark.

Nor are the unsoundness of the principle, the tendency to

disorganization, and the manifest injustice of this new doctrine, at all relieved by the general tone and language in which it is put forth. They all constitute one whole of unmixed character, and of deep and unfeigned regret; calculated only to bring our judiciary system into distrust with our own citizens, and discredit with the world; and thus to impair the usefulness, and ultimately break down this most important institution of the State. To this end I know the distinguished author of this new and alarming doctrine would not willingly contribute; nor would he willingly have his name associated with such a result. I would, therefore, invoke the aid of his talents and the weight of his high personal and official character, rather in building up our judiciary system, in sustaining and strengthening its separate parts, and in promoting the harmony of the whole; and thus commending it to the increased confidence of our own citizens, and to the greater respect of the world.

And Clinton, senator, in *Yates v. Lansing*,* says: "Great pains and much argument have been employed by the counsel for the defendant, to overthrow a decision made by this court at the last session, and to demonstrate, not only that the conclusions, but the reasoning adopted on that occasion, were untenable and fallacious. Although this course is unprecedented and totally unwarranted, yet the patience of the court was yielded without reluctance to a protracted discussion, which terminated in establishing what was never questioned: that the Court of Chancery, as well as every other court, has a right to punish contempts, and to apply the rod of chastisement to the conduct of its officers. But that chancery has the power of punishing for crimes; that a violation of a statute is not a misdemeanor, and that judicial responsibility is to ride over the rights of the people, and the Constitution of the land, are positions which yet remain totally unestablished. Although I am willing to yield every tribute of applause to the erudition and ingenuity of the counsel employed for the defendant, yet I cannot concede that they have succeeded in overturning the decision of this

* 9 Johns. 428.

tribunal. If I could conceive it relevant to the discussion to enter into a defence of the judgment of the court, I should not consider it attended with any difficulty to present a complete vindication ; but a measure of this kind would be an admission that a court might, at any time, and at all times, review its own decisions, or the decisions of its predecessors, and pronounce the law to be different, at different periods and on different occasions, thereby entirely destroying the authority of precedent, converting the judge into the legislator, and reducing us to a situation where we might truly say, '*Misera est servitus ubi jus est aut vagum aut incognitum.*' In the case of *Hartshorne and Others v. Slight*, (3 Johns. 562,) it was insinuated, with a view of obtaining the benefit of a second writ of error, that courts might and ought to review their decisions. On that occasion, I thought it my duty to resist a doctrine which I then considered, and still do consider, as of the most pernicious tendency ; and I animadverted upon it in the following words : This cause is now before us, and it does not avail the plaintiff in error to say that courts may and ought to review their own decisions. This court will hardly admit that doctrine. A motion for a rehearing after judgment has never been made or sustained, where a cause has been once settled. When a decision has been pronounced here, the law is established ; and no power can change it but the Legislature. The rule becomes binding, not only upon all subordinate tribunals, but upon this court.

“A contrary determination would involve not only the greatest absurdities, but the greatest mischiefs. Inferior tribunals would be without chart or compass ; the authority of decisions would be done away, and one fourth of the senators of this court changing every year, adjudications would fluctuate with the mutations of members. What was law yesterday would not be law to-day. It has never been known, at least in a court of *dernier resort*, that its decisions have been altered or revised in any other way than by the legislative power ; and even in courts not of *dernier resort*, if a different course has been, at any time, pursued, it has been remarked as a singularity. And, when Lord *Kenyon* attempted to question the authority of an adjudication of his

predecessor, it was considered as an anomaly, not as a rule in the conduct of judicial tribunals. *Stare decisis et non quieta movere*, is a maxim justly held in the highest veneration."

To the foregoing, we would add the remarks of Justice Darwin Smith, in *Olcott v. The Tioga Railroad Company*.*

"His decision was expressly put upon the case of *Faulkner v. The Delaware and Raritan Canal Co.*, (1 Denio, 441,) in which the precise point held by the referee is distinctly decided, and we are now . . . asked, . . . to overrule that decision. If we were sitting in a court of review, the correctness of that decision, upon principle, would be a legitimate question for discussion and consideration. The case . . . was decided in the old Supreme Court, about twelve years since. It was decided by a unanimous court, was acquiesced in then, and has been since, without debate or question, so far as we know, till the present occasion. This court, as now organized, is the Supreme Court still, with the same powers, and governed by the same rules and principles as the old Supreme Court under the former constitutions of this State. In the application of the principle of *stare decisis*, we should regard the decisions of the Supreme Court of this State at any former period, as the decision of the *same court* in which we are now sitting. It becomes, therefore, an important inquiry, how far, and upon what principle, this court is at liberty to depart from the doctrine of *stare decisis*. . . .

"The three thousand cases overruled, doubted or limited in their application, mentioned in *Greenleaf's Overruled Cases*, indicate that the tendency to assert and to carry out what is supposed to be the right in point of principle, is much greater than that of abiding by precedents and of adhering to decisions. And there is doubtless much greater danger of departing from the sound rule on this subject, in the present organization of this court, divided as it is into eight heads, than there was when the court possessed the unity of a single head, as under the former constitutions of the State. While with the larger number of judges, the press of business upon the court, and the multiplicity of decisions, the proportion of crude and hasty

* 26 Barb. 157.

opinions will necessarily be increased; and while it is the duty of the judges to meet all questions upon principle, and discuss them with freedom and firmness, that justice and right may prevail, yet something, most obviously, should be deemed settled in this court. There should, at some time, in this court, be an end of discussion, when questions decided should be deemed at rest, until the decision is reversed in the court of last resort. Such, as a general rule, should be the case of all questions carefully, clearly and distinctly decided by the old Supreme Court upon full argument, and by any general term of this court as at present organized. There is, however, an obvious distinction between the cases where the point decided was not the leading or chief point in the cause; where it did not receive full discussion at the bar, or was incidentally decided, without full examination, and those cases where the point in question was singly presented, fully discussed by counsel, and distinctly passed upon by the court. The case of *Faulkner* was one of the latter kind. The question of the statute of limitations was the only one in the case. The point was distinctly presented on demurrer, unconnected with any other question. It was, we may presume from the character of the counsel employed, fully and carefully argued, and distinctly and singly decided by the court, without dissent or objection. Such a decision should ordinarily be followed, until reversed by the Court of Appeals."

In *Butler v. Van Wyck*,* Mr. Justice Bronson proved by "reference to numerous cases that the court for the correction of errors did not abide by its own decisions."† And the present Court of Appeals in New York, at one time, became, we may say, notorious for its disregard of the previous decisions of that court: compare, for example, *Pell v. Ulmar*,‡ with *Olmstead v. Elder*.§

* 1 Hill, 438.

† Per Justice Brown, *The People v. Mayor of Brooklyn*, 9 Barb. 544.

‡ 18 N. Y. 139.

§ 5 N. Y. 144.

IV.

ON THE MISCHIEVOUS RESULTS OF ABANDONING THE PRINCIPLE OF *Stare Decisis*.—FROM SHARSWOOD'S LAW LECTURES. LECTURE 11.

THERE is no inconvenience so great, no private hardship so imperative, as will justify the application of a different rule to the resolution of a case, than the existing state of the law will warrant. The gifted author of the Eulogium upon the late C. J. Tilghman (Horace Binney) has touched this character of mind as displayed in that eminent man's judgment with a force and terseness which has left nothing to be desired. "There is not a line from his pen that trifles with the sacred deposit in his hands, by claiming to fashion it according to a private opinion of what it ought to be. Judicial legislation he abhorred, I would rather say *dreaded*, as an implication of his conscience. His first inquiry in every case was, of the oracles of the law for their response; and when he obtained it, notwithstanding his clear perception of the justice of the cause, and his intense desire to reach it, if it was not the justice of the law he dared not to administer it. * * *

With a consciousness that to the errors of the science there are some limits, but none to the evils of a licentious invasion of it, he left it to our annual legislatures to correct such defects in the system as time either created or exposed, and better foundation in the law can no man lay." It is not to be denied that there is some difficulty in settling with accuracy the limits of the maxim *stare decisis*. Certainly a few precedents, especially when they relate rather to the application than to the establishment of a rule, are not of so binding a character that they must be followed, "though flatly absurd and unjust;" but it is just as certain, that when the principle of a decision has been long acquiesced in, when it has been applied in numerous cases, and became a landmark

in the branch of the science to which it relates, when men have dealt and made contracts on the faith of it—whether it relate to the right of property itself, or the evidence by which that right may be substantiated—to overrule it is an act of *positive injustice*, as well as a violation of law; and a usurpation by one branch of the government upon the powers of another. We have heard a court in our own day declare, in regard to a rule of evidence of more than thirty years standing, that they “vainly hoped that the inconvenience of the rule would have attracted the attention of the Legislature, *who alone are competent to abolish it*; but as nothing was to be expected from that quarter,” they were “driven by stress of necessity” to give a judgment inconsistent, as they had themselves before decided, with the true spirit of the rule, and which lead the same court, by the same pretended stress of necessity, after having made the remarkable declaration, that the Legislature alone were competent to abolish it; within two years afterwards to pronounce it, “exploded altogether.” (*Post v. Avery*, 5 W. & S. 509; *Hart v. Heilner*, 3 Rawle, 407; *McClelland v. Mahon*, 1 Barr, 364.)

Lord Bacon says of retrospective laws: *Cujus generis leges raro et magna cum cautione sunt adhibendæ; neque enim placet Janus in legibus*. Without any saving clause, may the epithet and denunciation be applied to judicial laws. They are always *retrospective*, but worse on many accounts than *retrospective statutes*. Against the latter we have at least the security of the constitutional provision that prohibits the passage of any law which impairs the obligation of a contract, executory or executed; and it has been well held that this prohibition applies to such an alteration of the law of evidence in force at the time the contract was made as would practically destroy the contract itself by destroying the means of enforcing it; There is no such constitutional provision against judicial legislation. It sweeps away a man's rights vested, as he had reason to think, upon the firmest foundation, without affording him the shadow of redress. Nor could there in the nature of things be any such devised. When a court overrules a previous decision it must pronounce it no law, not bad law. There is no instance of judicial legislation on record in

which a court has instituted the inquiry, upon what grounds the suitor had relied in investing his property or making his contract, and relieved him of the disastrous consequences, not of his but of their mistake, or the mistake of their predecessors. The man who, on the faith of *Steele v. The Phoenix Ins. Co.* (3 Binn. 306), decided in 1811, and treated as so well settled in itself, and all its legitimate consequences, that in 1832 (*Hart v. Heilner*, 3 Rawle, 407), the court declined to hear any argument in its favor, invested his money in the purchase of a claim which could be proved only by the evidence of the assignor, found himself stripped of his property by a decision, in 1843, the results of which were broader than even the legislature itself would have been competent to effect, or indeed the people themselves in their constitution-making capacity—at least so long as the Constitution of the United States remains the supreme law of the land, “anything in the constitution or laws of any State to the contrary notwithstanding.” It may well be questioned at least whether, if the legislature had repealed the rule, their act would not have been construed to be inapplicable to the case of a *bona fide* assignment made before its passage.

But judicial is much worse than legislative retrospection in another aspect. The act of assembly, if carefully worded, is at least a certain rule. The act of the judicial legislature is invariably the precursor of uncertainty and confusion. Apply to it as a test, which may be set-down as unerring—never failing soon to discover the true metal from the base counterfeit—its effect upon litigation. A decision in conformity to established law and principles is the matter of repose on that subject; but one that departs from them throws the professional mind at sea without chart and compass. The cautious counsellor will be compelled to say to his client, “I cannot advise.” The cause is two-fold. One is the general uncertainty to which it leads; for men will argue and persuade themselves, when it is their interest to be persuaded, that if one clear and well established rule has been overruled, another decision quite as wrong, and not so well fortified by time and subsequent cases as that, may share the same fate. Shall counsel risk advising his client not to prosecute his claim or

advance his defence, when another more bold than he may moot the same point, and conduct another cause resting upon the same question, to a successful conclusion? The very foundations of confidence and security are uprooted, and the law becomes a lottery in which every man is disposed to try his chance—the costs being the price of his ticket; but the owners of the lottery—the public—unfortunately, so far from being reimbursed the expenses of the scheme by the receipts, not receiving a farthing from the gamblers, towards carrying on the machinery. Another cause is more particular than general. A tribunal scarcely ever makes a total overthrow of a rule of law at one stroke. It often requires repeated blows. Hence it frequently happens that there is a sliding scale of cases, to adopt a familiar term, and, when the final overthrow comes, it is very difficult sometimes to determine whether any and which of the steps of the process remain. Shortly after the decision in *Post v. Avery*, a case was tried in one of the inferior courts, in which the judge, thinking rightly that that determination, however the intention may have been disclaimed, was in fact a reversal of *Steele v. The Phoenix Ins. Co.*, refused to admit as a witness one of the nominal plaintiffs, a retiring partner, who, upon dissolution, had sold out for a price, *bona fide* paid, all his interest in the firm to his co-partner, who continued the business. Before the motion for a new trial came on to be heard, *Patterson v. Reed* (7 W. & S. 144) had appeared, and the court, upon the principles and reasoning of the opinion there, were compelled to hold that such an assignment for value, made without reference to its effect in rendering the assignor a competent witness, was not within the rule of exclusion the Supreme Court meant to establish, and they accordingly granted a new trial. Before the case was again called on, the first volume of Barr's Reports had been published, in which the Supreme Court had said: "The time is come when the doctrine of *Steele v. The Phoenix Ins. Co.* must be exploded altogether. The essential interests of justice demand that the decision in that case be no longer a precedent for anything whatever." And the judge who then tried the cause had no other course left but to do the very

thing which the court in bank had decided to be wrong, and on account of which a new trial had been ordered.

The case to which I have referred, is a most striking illustration of the mischievous results of abandoning the principle of *stare decisis*. I firmly believe that every part of the fabric of our jurisprudence felt the shock. It is usual to hear it excused on account of the unjust operation of the rule reversed, and the temptation it held out to the manufacture of false claims supported by perjury. Something might be said upon that point, were this the proper time and place. But it is to lose sight of the real question involved to raise such an issue; for like the execution of a notorious culprit, by the expeditious process of a mob and a lamp-post, instead of the formalities and delays of laws and courts, it may be a very good thing for the community to have rid itself of the offender, but the example of the means by which it was accomplished is a blow at the very root of the tree of public and private security.

There is another decision of our Supreme Court, not so bold and avowed an act of judicial legislation as that just mentioned, but not less transparent, which may be referred to as strongly illustrating the same consequences of uncertainty and litigation flowing from a disregard to the principle adverted to. From the year 1794 there had existed in Pennsylvania an act of assembly limiting the lien of the debts of a decedent on his real estate to at first seven, now five years. No question ever arose in regard to it. Lien was considered to mean lien and not obligation, lands merely chattels for the payment of debts, and the limitation intended for the protection of purchasers from the heirs or devisees, or it may be their lien creditors. Such an understanding of the law was incidentally recognized in 1795 (*Hannum v. Spear*, 1 Yeates, 566), and distinctly ruled in 1830, when it arose collaterally in a cause (*Brush v. Lantz*, 2 Rawle, 392); yet on grounds palpably more relevant to what in the opinion of the court the law ought to be than to what it was, it was held in 1832 (*Kerper v. Hoch*, 1 Watts, 9), that the period named was a limitation, not of the lien but of the debt itself, and available in favor of heirs and devisees—volunteers under the debtor and succeeding to his rights *cum onere*. As we have seen, but

two cases are to be produced of litigation arising out of this law carried to the highest tribunal in the long tract of time from 1794 to 1832, but upon the decision of *Kerper v. Hoch*, they came up in quick succession, and at least some twenty cases can be enumerated in the period elapsing since in which that court has been called upon to draw distinctions, and settle the precise extent of their own meaning. Thus a little complicated system of itself has grown up on this construction of the act, a labyrinth in which we have scarce a clew to guide us, when if it had been left alone, to speak for itself, it would have been a plain rule of action and decision until the legislature saw fit to alter it. It seems that this consideration has pressed upon at least one of the judges who joined in that decision, for in a late case upon this subject, when *Kerper v. Hoch* was cited, that judge, with characteristic candor, interrupted the counsel with the remark, "We will abide by the rule, but it was erroneously decided." (4 Barr, 498.) The practice of recording and publishing such *dicta* I cannot but think ought to be reformed; but that does not weaken the force of the remark in the view now presented.

There are other cases in my mind which could be used effectively to show the same results, not in our Supreme Court only, but in England and elsewhere. The construction placed in Westminster Hall on the statutes of uses, of frauds, and of limitations, would easily form a volume in illustration of the same position. Lord Mansfield, with all his high powers and varied attainments, though justly considered as the founder of English commercial law, which in his time, from the extension of the power and trade of Great Britain, first began to grow into importance, undoubtedly erred, from a laxity of principle, in regard to the matter now in question; and it was well said, that, it seemed to be the principal business of Lord Kenyon, who succeeded him, to overturn what his predecessor had established. I make no apology for drawing my illustration from our own neighborhood and times, nor for speaking frankly of the judgments of the Supreme Court of this State, a tribunal for the general soundness, wisdom and ability of whose expositions and administration of the law, no

one in the commonwealth can exceed me in respect and confidence.

It may be said that this is dealing exclusively with the bench. But it is to be remembered that the bench and the bar are the same body—parts of the same administration. Not only is the bench exclusively taken from those who compose the bar, but they act and react on each other. A liberal, sound and thoroughly learned bar has a direct action and influence upon the bench, which none but those who are in the daily course of observation in the courts can fully appreciate. It is a real misfortune in Pennsylvania that owing to the ambulatory character of our Supreme Court, we really have no State bar to exercise this wholesome and steady influence on the bench. That a sound bar, therefore, is of vast importance to the public, and that a sound legal education is proportionally important, can not fail to follow from the considerations which have been presented. I mean that the members of the profession should be most carefully trained in such a conscientious dread of any disturbance of the landmarks of the law—except with slowness, caution, and deliberation, and by the legitimate authority—as to frown upon any course, even where it might result in the private benefit of a client, but at the expense of the general certainty and security of rights, and the symmetry and beauty of the science of which they are professors, and to which they all owe allegiance. This may be hoped for, when their calling is regarded rather as a public than a private one—when they consider themselves as officers of the courts, as well as attorneys of the parties, and when they are impressed with a proper sense of the dignity and usefulness of the part they are called upon to play in the administration of justice and public affairs.

INDEX.

- ABRIDGMENTS, kinds of, 162, 189.
 authority of, 162, 189.
 how to be used, 350.
- ABSURDITY, as a ground of judgment, 120.
- ACT OF PARLIAMENT. *See* Statutes.
- ACTION on the case, 277.
- ADHERENCE to one decision, 196.
 to two or more decisions, 212.
 to a fixed doctrine, 228.
 to the rule of *stare decisis*, 197, 231, 235, 413, 423.
- ADMIRALTY COURTS adopt the civil law, 134.
- AFFIRMANCE, when it will be ordered, 50.
- ALTERATION. *See* Change.
- ALVANLEY, Lord. His knowledge of real property law, 303, 305, 310.
- AMERICAN REPORTS, quality and number of, 193, 195.
 TEXT-BOOKS, superiority of, 168.
- AMICABLE SUIT, decision in, of little authority, 317.
- ANALOGY, is a guide in forming a legal judgment, 116.
 reasoning by, to be pursued with caution, 118.
- ANCIENT DECISION, authority of, 211, 315.
- ANCIENT LIGHTS, English rules as to, not adopted in the United States, 38.
- ANCIENT READINGS, remarks upon, 159.
- ANONYMOUS cases, authority of, 318.
 reports, remarks upon, 188.
- APPENDIX, 399.
- ARGUMENTS, as a ground of judgment, 110.
 of civilians, 386.
 of counsel, weight which courts attach to, 170.
 of hearing, 352.
 hearing second, 353.

ARGUMENTS of counsel—*Continued.*

reported by Coke & Croke, 170, *note*.
changing opinion of the court, 358.
eliciting praise of the court, 360.

ASHHURST, a learned judge, 304.

ASSETS, equitable bias of court in favor of, 379.

ASTON, J. His knowledge of sessions law, 306.

ATTORNEY, importance to, of a knowledge of the materials of
a judgment, 23.

not bound to know all the law, 323.

AUTHOR, authority of, during his life, 166.

may increase authority of a decision, 315.

See Law Writer.

AUTHORITIES, state of, 26.

AUTHORITY, of a single decision, 196.

of two or more decisions, 212.

of ancient decision, 211, 315.

of *nisi prius* decision, 313.

decisions when not of any, 218.

practice of conveyancers is, 123, 128.

of the comparative value of, 283.

of circumstances which increase the value of, 299.

of circumstances which lessen the value of, 316.

of a decision of the House of Lords, 283.

of a decision of a court of error, 286.

of a decision in bank, 288.

of a decision at *nisi prius*, 289.

of an interlocutory decision, 291.

of a decision in bankruptcy, 291.

of a decision of an inferior court, 292.

in America of English decisions, 293.

of domestic over foreign decisions, 295.

of decision of Supreme Court of United States, 295.

of State decisions in federal courts, 296.

conflict of, 244, 327.

of courts, 150.

AXIOMS, maxims not to be received as, 45.

BACON'S ELEMENTS, remarks upon, 156.

Essay on Judicature, 407.

BANK. *See* Court in Bank.

BANKRUPTCY, authority of decisions in, 291.

- BARNARDISTON, remarks upon his reports, 179.
 BATHURST, Lord, authority of his decisions, 309.
 BIAS of courts, in forming their judgments, 376.
 BLACKSTONE'S COMMENTARIES, remarks upon, 157.
 BOOKS. *See* Text Books.
 BRACTON *de Legibus*, remarks upon, 152.
 BRIDGMAN, an eminent judge, 300.
 BRIEFS, sometimes referred to for information, 349.
 BROOKE'S Abridgment, remarks upon, 162, 189.
 BROWN'S Chancery Reports, remarks upon, 180.
 BULLER justly estimated in the profession, 304.
 BUNBURY'S Reports, remarks upon, 180.
 BURNS' Ecclesiastical Law, remarks upon, 161.
 BURROUGH, no ordinary man, 304.
 BURROW'S Reports, remarks upon, 180.
- CALLIS' Reading upon Statute of Sewers, remarks upon, 161.
 CAMDEN, Lord, his accuracy, 308.
 CANON LAW, what it is, 143.
 how far authority in England, 143.
 CARTHEW'S Reports, remarks upon, 181.
 CASES, no two exactly similar, 25.
 the best proof of what the law is, 174.
 See Decided Cases.
- CERTAINTY, in the law, is better than judges speculating to improve the law, 24.
 the mother of repose, 25.
 in law, advantages of, 199.
 in the law, can be obtained only by respecting precedents, 200.
 it would be unwise to make law absolutely unchangeable, 200.
 importance of, is a ground for adherence to a former decision, 200.
 See Uncertainty.
- CERTIFICATE of a court of law, 366.
 CHAMBRE, J., an eminent lawyer, 303, 306.
 CHANCERY. *See* Courts of Equity.
 CHANGE of rules of law, with change of things, 73-83.
 CHILDREN'S portions, bias of courts respecting, 379.
 CHRISTIANITY, a material of a judgment, 33.
 CIRCUIT CASE, authority of, 319.

CIRCUMSTANCES which increase the value of an authority, 299.
 which lessen the value of an authority, 316.
 rules of law changing with, 73.

See Particular Circumstances.

CIVILIAN, taking opinion of, 386.

CIVIL LAW, maxims borrowed from, 43 *note*.

as to navigable rivers prevails in the United States,
 85.

what is understood by, 133.

how far a branch of English law, 133.

received in the ecclesiastical and admiralty courts,
 134.

followed as a rule for its equity, 139.

notice of in reports *tempore Finche*, 139.

how far binding in the United States, 139.

Lord Eldon's ignorance of, 140.

a competent knowledge of, indispensable to the law
 student, 141.

titles of works upon, 141.

CLARENDON, Lord, authority of his decisions, 319.

COKE'S Commentary, remarks upon, 154.

Reports, remarks upon, 181.

COMMERCIAL LAW, foreign authors on, are treated as author-
 ity, 170.

COMMON LAW, a material of judicial decision, 18.

is but reason, 30.

definition of, 35.

has not every where the same meaning, 37.

of England, how far adopted in the United
 States, 37.

how far it controls statutes, 38.

adapts itself to circumstances, 75.

custom of merchants, a part of, 127.

regards foreign laws, 127.

was improved by incorporating much of the
 civil law, 137.

new inventions in derogation of, 280.

COMMON OPINION, is authority in law, 39.

COMMON SENSE, still lingers in Westminster Hall, 32.

a material of a judgment, 33, 34.

COMPASSION. *See* Bias, Hardship.

COMPROMISED SUIT, authority of decision in, 318.

- COMYNS, a very able common lawyer, 302.
- COMYNS' Digest, remarks upon, 162.
- CONFLICT of Decision, how dealt with, 242.
 sometimes irreconcilable, 244, 327.
 obliges a recurrence to first principles,
 245.
- CONFLICT OF LAWS, part of the law of nations, 147.
- CONSENT, decision made by, of little authority, 316.
- CONSEQUENCES of a judgment to be considered, 111, 223, 232,
 394.
- CONSTITUTION, The, a material of a judgment, 33.
- CONSTRUCTION of statutes. *See* Statutes.
 of judgments. *See* Judgments.
 of wills. *See* Wills.
- CONVENIENCE, a principle of legal judgment, 110.
 should turn the scale, where decisions are con-
 tradictory, 110.
- CONVEYANCERS, practice of, is authority, 123, 128.
 opinions of, to be respected, 223.
 See Counsel.
- COPY-HOLDS, forfeiture of, odious, 378.
- CORPORATIONS, have no souls, argument to prove, 325.
 See Religious Corporations.
- COUNSEL, importance to, of a knowledge of the materials of a
 judgment, 23.
 weight which courts attach to arguments of, 170.
 reading opinion of, to court, 347.
 of hearing arguments of, 352.
 duty of judges to prevent them talking nonsense, 353.
 See Argument of Counsel. Lawyers.
- COURT in Bank, its decisions more authoritative, than if made at
 nisi prius, 288.
- COURT OF ERROR, authority of decision of, 286.
 should adhere to its own decisions, 413.
- COURTS, sometimes legislate, 21.
 bound by the statute and common law, 65.
 the same rules should prevail in all, 70.
 to take notice of ecclesiastical law, 145.
 of law, should follow decisions of courts of equity, 70.
 their practice and course of proceeding, should be adapted
 to existing state of society, 75.
 are bound by principles of law, 87.
 are judges of their own rules, 126.

COURTS—*Continued.*

- are judges of legality of customs, 128.
- difference between power and authority of, 150.
- errors of, corrected by text writers, 169.
- sometimes misled by text writers, 169, 351.
- weight attached by, to arguments of counsel, 170.
- respect the opinions of foreign writers on commercial law and on domicile, 171.
- refer to miscellaneous works, as occasion requires, 171.
- refer to dictionaries, 172.
- poets, reviews, and newspapers quoted in, 172, 173.
- language of to be construed with reference to the facts before it, 250.
- usually decide only the very case before them, 258, 260.
- not to be misled, by hardship of the case, 116, 380, 396.
- deciding on particular circumstances, 256.
- must make precedents when new cases occur, 274.
- division of, 332, 333.
- divided, lessens authority of decision, 316.
- certain duties of, 323, 407.
- gaining information from their officers, from civilians, and from merchants, 344.
- learning the whole truth of a case reported, 347.
- obtaining the opinion of another judge or court, 361.
- influenced by arguments of counsel, 358.
- complimenting arguments of counsel, 360.
- should give reasons for their decisions, 366.
- bias of, in forming their judgments, 376.
- no respecters of persons, 381.
- of Equity*, bound by precedent, 58, 60, 67.
 - sometimes ask opinion of the courts of law, 361, 363.
 - follow the law, 60, 67.
 - adopt the civil law, 136.
 - province of, 61.
 - sometimes decide questions of law, 68.
 - bound by the statute and common law, 65.
 - no scope for individual caprice in, 66.
 - decisions of, are authority in a court of law, 68, 70.
 - often require information from their officers, 344.
 - direct issues in actions, 370.

COURTS of Equity—*Continued.*

competent to decide questions of fact and law, 370.

not bound by certificate of court of law, 371.

COWPER, a great master of equity, 301.

CUSTOMS, a material of a judgment, 39.

to be considered in construing statutes, 39.

are local and general, 130.

several States have, 39.

English, not imported into the United States, 39.

courts to judge of legality of, 128.

new, arise as the times alter, 75.

of merchants part of common law, 127, 129.

evidence of, 128, 129.

DALTON'S *Country Justice*, remarks upon, 163.

DECIDED CASES, among the principal authorities in law, 47

evidence of the law, 196.

have different value, according to circumstances, 47.

are precedents, 197.

are not the law, but only evidence of it, 47, 197.

erroneous, are not *bad law*, but *not law*, 47.

the law is made up of, 48.

are authority, although not decided by a full court, 48.

the best proof of what the law is, 174.

the only authority for much of the law, 48.

assumed grounds of, where judges unite in, 48, 49.

to each belongs a record, 174.

where judges equally divided in opinion, 49, 316, 332.

reason and spirit of, make law, 53.

not reported, because grounds of decision uncertain, 56.

in equity, authority of, 58, 66, 69, 70.

few upon acknowledged and settled rules, 151.

circumstances which augment the authoritative force of, 201, 299.

a reason for adherence to, is certainty, 202.

if not reported, the record is authority, 174.

adherence to two or more, 212.

departure from, 215.

DECIDED CASES—*Continued.*

- anomalies arise from following, 217.
- when not authority, 218.
- instances of, adherence to a single decision, 203.
- effect of length of time upon, 211.
- absence of modern, effect of, 211.
- overruling, 221.
- series of, not conclusive evidence of the law, 241.
- when contradictory, latest to be followed, 242.
- standing alone, may be disregarded, 246.
- distinguishing from a case in hand, 248.
- when become settled law, the courts cannot reverse them, 248.
- confining to an exactly similar case, 251.
- comparative value of, as authority, 283.
- circumstances which may increase the value of, 201, 299.
- circumstances which may lessen the value of, 316.

See Reports, Judgments.

DECISION on non-enumerated motion not *res adjudicata*, 226.

discordant, how to be dealt with, 242.

on particular circumstances, 256.

of new cases, 268.

See Decided cases, Discordant decisions, Judgment,

Nisi prius, Habeas Corpus.

DEEDS. *See* Interpretation.

DEFINITION of law of nature, 34.

of law of nations, 147.

of common law, 35, 30, 37.

of reports, 174, 176.

of maxims, 43.

of judgments, 52.

of discretion, 62.

of a rule, 72.

of a judicial opinion, 88, 90.

of an extra-judicial opinion, 88, 90.

of *obiter dictum*, 89.

DEGGE'S *Parson's Counsellor*, remarks upon, 163.

DE GREY, a most learned judge, 303.

DELAY, and denial of justice identical, 387.

See Postponement.

DENISON, a most excellent lawyer, 303, 306.

DEPARTURE from one decision, 215.

from precedent incurs a high degree of responsibility, 225.

from precedent occasions inconvenience, 231.

DICKENS' *Reports*, remarks upon, 184.

DICTA, defined, 89.

are authority, 90, 99.

rules for considering weight to be given to, 100, 101.

judges sometimes dislike to give, 90.

parties taking advantages of, 91.

capable of several applications, 92.

rule for gathering the meaning and extent of, 97.

to be limited to the subject-matter, 97, 99.

to be taken with great allowance, 99.

difficult to report correctly, 99.

circumstances which may augment the value of, 102.

circumstances which may lessen the value of, 104.

of less authority than a decision on point in issue, 105.

a decision may be right, although containing erroneous *dicta*, 108.

usage may control, 122.

See Opinion.

DICTIONARIES, referred to by the courts, 172.

DIFFERENCE, among judges, 332-335.

DIFFICULTY, certain facts illustrative of, 326.

in interpreting instruments, 337.

in administering justice, account of, 399.

DIGESTS, authority of, 162.

to be used with caution, 351.

See Abridgments.

DISCORDANT DECISIONS, which to be followed, 242.

impossibility of reconciling, 244.

DISCRETION, the law of tyrants, 62.

what is meant by, 62.

crooked cord of, not to be followed, 199.

DISTINCTIONS, kinds of, 253.

courts often refuse to take refined, 254.

refined, when settled are to be adhered to, 255.

DISTINGUISHING a present case from a former case or out of a settled rule or doctrine, 248.

DOCTOR AND STUDENT, remarks upon, 159.

DOCTRINA PLACITANDI, remarks upon, 159.

- DOCTRINE, may be law, although reasons not sufficient, 223.
 origin of, may often be named, 265.
fixed, adherence to, 228.
 often difficult to say what is, 239.
 extension of certain, traced, 266.
- DODDRIDGE'S Treatise, remarks upon, 158.
- DOMICILE, courts resort to writings of foreign jurists, as to, 171.
- DOUBLE Portions, leaning against, 379.
- DOUBTS, judicial, 327.
- DUTIES, of courts and judges, 323, 407.
- DYER'S Reports, Chief Justice Treby's notes to, 192.
- ECCLESIASTICAL COURTS, adopt the civil law, 134.
- ECCLESIASTICAL LAW, to be noticed by the courts of common law, 145.
 how far introduced into the United States, 145.
- ELDON, Lord, the greatest judge, 304.
 value of his doubts, 327.
 faults in his judicial style, 389.
 did not trust to counsel's statements, 389, 391.
- ELOQUENCE, judicial, specimens of, 392.
- ENGLISH customs, how far adopted in United States, 37.
 decisions, authority of, in courts of United States, 293.
 citation of, forbidden, 295.
 law, brought to the United States, 36.
 statute law, how far adopted in United States, 37, 38.
- EQUITABLE Assets, partiality of courts for, 379.
- EQUITY, as an agency for keeping law in harmony with existing state of society, 76, 79.
- EQUITY Decisions, anciently decided on notion of Law of God, 35.
 governed by precedent, 58, 62.
 sometimes follow the law, 60.
 See Courts of Equity.
- ERRORS, judges readily acknowledge, 325.
 caused by haste, 387.
 See Court of Error.
- ESTIMATING the value of decisions, 283.
 the value of *dicta*, 97.
- EVIDENCE of Customs, when admitted, 128, 129.
- EX-PARTE Decision, authority of, 316, 317.
- EXTRA JUDICIAL OPINION, what it is, 88, 90.
- EYRE, C. B., a strong-headed man, &c., 303, 306.

FAVOR. *See* Bias.

FEDERAL COURTS, how far bound by decisions of the State courts, 296.

FICTIONS, as an agency for keeping law in harmony with existing state of society, 77.

prevent an orderly distribution of the law, 79.

how they affect the law, 81.

FITZGIBBONS' Reports, remarks upon, 184.

FITZHERBERT'S *Natura Brevium*, remarks upon, 153.

FIXED DOCTRINE, adherence to, 228.

often difficult to say what it is, 239.

FIXTURES, leaning in regard to, 378.

FOREIGN AUTHORS on commercial law, respect paid to, 131, 170.

on domicile, consulted by the courts, 171.

FOREIGN COUNTRIES, courts inquire into practice of, 386.

FOREIGN LAW, regarded by the common law, 127.

often used as a guide in questions of mercantile law, 131.

FORFEITURE of Copyholds, 378.

FORMS, as evidence of the law, 41.

in law resemble the formulæ in mathematics, 42.

sometimes become substance, 42.

giving a construction to a statute, 42.

See Precedent.

FORTESCUE *de Laudibus*, remarks upon, 153.

GENERAL LANGUAGE of a decision, how understood, 97, 99.

GENERAL PROPOSITIONS, courts approach to, by degrees, 256.

GIBBS, a most learned judge, 304, 306.

GIBSON'S Code, remarks upon, 161.

GLANVILLE *de Legibus*, remarks upon, 152.

GLOSSARIES, referred to by the courts, 171.

GREEK INTELLECT, could not confine itself to legal formula, 20.

HABEAS CORPUS, decision on, is not *res adjudicata*, 227.

HALE, an able judge, 300.

HALE'S History, remarks upon, 156.

HARCOURT, Lord, manuscript tables, 191.

HARD CASES make bad law, 116.

- HARDSHIP**, courts not to be misled by, 116, 380, 396.
 occasioned by decisions, to be removed by the legislature, 200, 380.
- HARDWICKE**, a great authority, 302, 309.
- HASTE**, in deciding a cause, 316.
 in deciding occasioned error, 387.
- HAWKINS'** Treatise, remarks upon, 160.
- HEATH**, J., a very learned judge, 303, 307.
- HEIR AT LAW**, favored by the courts, 377.
- HOBART**, a great man, 300.
- HOBART'S** Reports, remarks upon, 184.
- HOLT**, above all praise, 301.
- HOUSE OF LORDS**, practice of, to state reasons for their judgments, 55.
 decisions of, are the highest authority, 283.
 decisions, sometimes not of great weight, 320.
 judges desiring their decisions to be reviewed in, 331.
- HUMANITY**, a material of a judgment, 33.
 law upholds, 35.
- IDEA.** *See* Uniform Idea.
- INCONVENIENCE**, a principle of legal judgment, 111, 231.
 not regarded, if the law is clear, 113.
 decision governed by, 396.
 weight and existence of, sometimes a matter of dispute, 114.
 should not weigh against provisions of a statute, 116.
 nothing that is inconvenient is lawful, 114.
 Public, to be avoided, 115.
- INFERIOR COURT**, authority of decision of, 292.
- INJUNCTION**, grant of, not to affect ultimate decision, 292.
- INLAND NAVIGATION**, common law of England as to, not adopted in United States, 85.
- INTERLOCUTORY ORDERS**, authority of, 291.
- INTERNATIONAL LAW.** *See* Nations, law of.
- INTERPRETATION** of *dicta*, 97, 99.
 of instruments, difficulty in, 323, 337.
 See Private interpretation, Statutes, Wills.
- INTESTACY**, courts struggle to prevent, 379.

JEKYLL, Sir J., a man of consummate knowledge, 302, 305.

JOINT TENANCY, not favored, 378.

JUDGES, to declare, not to make law, 18, 199.

do in effect sometimes legislate, 21.

importance to, of a knowledge of the materials out of which judgments are constructed, 23.

if they do not make new law, develop the old, 26.

the architects of the law, 47.

bound by the practice, 123.

declining to give any opinion, 49, 50.

equally divided in opinion, 49, 316.

judgment of, cannot be attacked for anything that took place among them privately, 50.

Junior, sometimes withdraw their opinions, 50

not bound to give reasons for their judgments, 52.

dislike to utter *dicta*, 90.

not to legislate, 115.

certain duties of, 323, 407.

not bound to know all the law, 323.

want of knowledge, 324.

logic of, 324.

readily acknowledge their errors, 325.

difference in opinions of, 332.

usually differ with great respect for each other, 335.

authority of text-books written by, 152, 166.

inspired, 167.

to prevent counsel talking nonsense, 353.

note, correcting report by, 177.

changing their opinions, 211, 317, 326, 327.

whose opinions increase the authority of a case, 305.

whose particular judicial character give weight to their opinions, 307.

sometimes decline to give an opinion, 381.

will not hear a cause in which they are interested, 382.

refusing to try a cause, 383.

should guard against precipitancy and procrastination, 387.

taking time to consider, 387, 391.

JUDGMENT, of what materials constructed, 18, 33.

not creative of law, 18.

unreversed, is law, 19.

when it may be disregarded, 19.

overruling a statute, 19.

JUDGMENT—*Continued.*

- correcting by statute, 20.
- sometimes amounts to legislation, 21.
- and legislation, difficult to define boundary between, 22.
- process which a judge may use to construct, 23.
- adherence to, 24.
- landmark of safety, 25.
- departure from, 27.
- system of, its merits and defects, 30.
- principle, a common ground of, 87.
- controlled by text-books, 151.
- courts not bound to give reasons for, 52.
- defined, 52.
- reason of, is important, 53, 54, 55.
- of House of Lords, 55.
- reasons of, should be fully given, 56.
- valid, although reasons faulty, 56.
- during the Stuart dynasty, are authority, 57.
- may be right, although containing some erroneous *dicta*, 108.
- convenience, a principle of, 110, 396.
- analogy is a guide in forming, 116.
- argument *a fortiori* as material of, 118.
- practice, a material of, 121.
- contrary to the first inclination of opinion, 211.
- postponing the delivery of, 383.
- taking time to consider, 384–391.
- writing out, recommended, 389.
- Judge Story's method of preparing, 388.
- looking to the consequences of, 394.
- See* Decision, Dicta, Opinion.

JUDICATURE, essay on, 407.

JUDICIAL DECISION. *See* Dicta, Judgment.

JUDICIAL ELOQUENCE, specimens of, 392.

JUDICIAL LEGISLATION, dangers of, 423.

JUDICIAL LOGIC, specimens of, 324.

JUDICIAL MIND, distinct from personal conscience, 31.

JUDICIAL OPINION, of what it may consist, 53, 88.

how to be construed, 98.

See Opinion.

JUSTICE, is as binding on communities as on individuals, 148.

a material of a judgment, 33.

JUSTICE—*Continued.*

speedy or slow, 387.

difficulties in administering, 399.

See Natural justice.

KEBLE'S Reports, remarks upon, 184.

KENYON, Lord, his legal knowledge, 307.

KING, Lord, his adherence to the common law, 307.

LABOR, English statutes regulating price of, not in force in the United States, 37.

LANGUAGE. *See* General Language.

LAW, materials of which constructed, 18.

judges are to declare, not to make, 18, 199.

book cases best proof of what it is, 174.

judgments not creative of, 18.

judgment unreversed is, 19.

advantages of certainty in, 24, 199.

no matter what it is, so that it be certain, 25.

the object of, is peace, 25 *note*.

merits and defects of, 30.

continually struggling to combine inflexible rules, with perpetually varying relations, 26.

pleadings as evidence of the, 41.

maxims are part of the, 43.

decided cases, principal authority in, 47.

judges, the architects of, 47.

decisions are evidence of, 47.

is reason, 30, 32, 35.

is founded on law of nature, and revealed law of God, 35.

upholds religion and humanity, 35.

law of nations part of, 147.

of the authority of certain text and other books in, 150.

anomalies in, how they arise, 217.

is made up of decided cases, 48.

decided cases the only authority for much of, 48.

reason and spirit of decisions make, 53.

decided cases only evidence of, 196.

equity follows, 60.

depends upon principles, 197.

must change with the nature of things, 73.

ought not to be changed according to the times, 75.

LAW—*Continued.*

- progressive societies always in advance of, 76.
- how kept in harmony with existing state of society, 76.
- settled rules are, 86.
- rules are principles of, 87.
- cannot suffer anything that is inconvenient, 111.
- hard cases make bad, 116.
- practice makes, 122.
- usage has great force in the construction of, 122.
- can be made certain only by respecting precedents, 200.
- unwise to make it absolutely unchangeable, 200.
- series of decisions not always conclusive as to what is, 241.
- becoming a matter of memory, 254, *note*.

See Justice.

LAW MAKING, manner of, 17.

See Legislation.

LAW OF GOD, anciently, cases in equity decided on notion of, 35.

See Revealed Law of God.

LAW OF NATURE, a material of a judgment, 18, 33.

defined, 34.

earliest recognition of, 34.

municipal law is founded upon, 35.

LAWSUITS, as a means of making law, 17.

results of, must always be uncertain, 26.

reason for uncertainty in result of, 29, 399.

LAW WRITER, not authority during his life time, 166.

English, inferior to American, 169.

correcting errors of the courts, 169.

may increase the authority of a decision, 315.

LAWYERS, wills of, often litigated, 343.

See Attorney, Counsel.

LEANING. *See Bias.*

LE BLANC, J., an accurate judge, 308.

LEE, Ch. J., conversant with sessions law, &c., 306, 307.

LEGACIES, law of, borrowed from the civil law, 135.

specific, leaning against, 379.

LEGAL REASON, a material of a judgment, 33.

See Reason.

LEGISLATION, kinds of, 17.

judgments sometimes amount to, 21.

and judicial determination, difficult to define
boundary between, 22.

LEGISLATION—*Continued.*

as a means of keeping law in harmony with existing state of society, 76, 80.

LEX MERCATORIA. *See* Merchants, Mercantile Law.

LEVINZ' Reports, remarks upon, 185.

LIGHTS. *See* Ancient Lights.

LILLY'S Practical Register, remarks upon, 163.

LITTLETON'S Tenures, remarks upon, 153.

LOCAL CUSTOM, not part of the common law, 130.

See Customs.

LORDS. *See* House of Lords.

MACCLESFIELD, a great chancellor, &c., 301, 306.

MAKING LAW. *See* Law Making.

MANSFIELD, Lord. The founder of English commercial law, 302, 305.

his desire for popularity, 410 *note*.

MANUSCRIPT NOTE, by which to correct report, 177, 349.

authority of, 28, 29, 318.

Lord Eldon's practice of referring to, 349.

table of Lord Harcourt, 191.

See Unreported Cases.

MARIUS' Advice on Bills of Exchange, remarks upon, 163.

MARKET OVERT, English rule as to sale in, not adopted in the United States, 38.

MATERIALS of which the law is made, 18.

of which judgments are constructed, 18, 33, 110.

of judgments, important knowledge, 23.

in United States, 33.

practice is, 121.

MAXIMS, are part of the law, 43.

are principles, 43.

defined, 43.

borrowed from civil law, 43, *note*.

not to be received as axioms, 45.

not universally true, 45.

collection of, 44.

general, to be laid down with caution, 98.

MEMORY, law becoming a mere matter of, 254, *note*.

MERCHANTS, custom of, is part of the law, 127.

consulting, as to usage of trade, 346.

- MERCANTILE LAW, importance of certainty in, 24.
 courts yield to principle of, 129.
 consulting, merchants as to, 346.
- MERCANTILE USAGES, great respect paid to, 129.
 See Merchants.
- MISCHIEF. *See* Inconvenience.
- MITFORD'S Pleading, remarks upon, 158.
- MODERN DECISION, absence of, how it affects a question, 211.
- MORALITY, a material of a judgment, 33.
- MOSELY'S Reports, remarks upon, 185.
- MOTION, decision on non-enumerated, not *res adjudicata*, 226.
- MUNICIPAL LAW, is founded on Law of God, 35.
 See Law.
- NAMES, which augment the value of an authority, 299.
- NATIONS, law of, what it is, 147.
 part of the law of England, 147.
 division of, 147.
 text-books upon, 148.
- NATURAL Equity, a material of a judgment, 33.
- NATURAL JUSTICE, a material of a judgment, 33.
 rule of, can never vary, 35.
 See Justice.
- NATURE, law of, a material of a judgment, 18, 33.
 defined, 34.
 earliest recognition of, 34.
 municipal law is founded upon, 35.
- NAVIGABLE RIVERS, English rules as to, not adopted in the
 United States, 38, 85.
- NEW CASES, of deciding, 268.
 a great variety of principles open on which to de-
 cide, 270.
 decided on principle, 273.
 may not be new in principle, 274.
 when they occur, court must make a precedent,
 274.
 objection to granting relief in, 278.
 See Novelty.
- NEWSPAPER quoted in the courts, 173.
- NEW YORK Reports, character of, 193.
 judges, eminence of, 308.
- NISI PRIUS Decisions, authority of, 288, 313.
- NOLAN, on the poor laws, remarks upon, 164.

- NON-ENUMERATED MOTION, decision upon, not *res adjudicata*, 226.
- NORTHINGTON, a great lawyer, 302.
- NOTE, *See* Dyer's Reports, Manuscript.
- NOTTINGHAM, a great judge, 301.
- NOVELTY as an objection to relief, 278.
in derogation of common law, 280.
See New Cases.
- NOY'S Reports, remarks upon, 186.
- OBITER DICTUM, what it is, 89.
See Dicta.
- OFFICE of Executors, book so-called remarked upon, 164.
- OPINION, kinds of, 88.
of the profession a ground of decision, 40, 223.
difference in reason not a difference in opinion, 53.
judges declining to give, 49.
judges divided in, 49, 333.
junior judges sometimes withdraw, 50.
Judicial, of what it may consist, 53.
defined, 88, 90.
Extra Judicial, defined, 88, 90.
general expressions of, to be taken in connection with the facts, 98.
change of, 211.
Legal, large portion of, is law taken for granted, 217.
judge deciding against his own, 230.
of court, usually confined to a particular point, 260.
not usually given on questions not before the court, 261.
reserving, until the happening of a contingency, 262.
courts sometimes express an opinion on a point, without deciding the point, 265.
different opinions in one case, 332.
difference of, 333, 49.
of counsel, reading to the court, 347.
of another court or judge obtaining, 361.
of civilians obtaining, 386.
See Common Opinion.
- ORDER, interlocutory, authority of, 291.
- OVERRULED CASES, instances of, 221, 421.
lists of, appended to volumes of reports, 228.

- PARLIAMENT, Act of. *See* Statutes.
- PARTICULAR CIRCUMSTANCES, deciding on, 256.
- PEACE, the object of the law, 25 *note*.
- PERKIN'S Profitable Book, remarks upon, 159.
- PETITION in Bankruptcy, authority of decision upon, 291.
- PHILLIPS on Evidence, remarks upon, 164.
- PLEADERS, practice of, 121.
- PLEADING as evidence of the law, 41.
- PLUMER, Sir J., a man of great industry, 308.
- POETS quoted by the courts, 172.
- POINT often adjudged should rest in peace, 228.
 court may express an opinion upon, without deciding, 265.
 not noticed, 264.
 new one sometimes arises, 269.
 frequently occurring, yet never decided, 269.
 so clear, as not to be doubted, 269.
- POLICY, public, 110, 410 *note*.
- PORTIONS, double, leaning of courts against, 379.
- POSTPONING Delivery of Judgment, 383.
- POTHIER, respect paid to the writings of, 131.
- POWELL, a lawyer of no mean talent, 301.
- POWER of a Court, 150.
- PRACTICAL Register in Chancery, remarks upon, 164.
 See Register.
- PRACTICE of Courts should adapt itself to existing state of society,
 75, 281.
 courts cannot depart from, to do justice in a particular
 case, 116.
 is authority and material of a judgment, 121.
 long settled, not to be disregarded, 121.
 of merchants, is authority, 128.
 of conveyancers, is authority, 123, 128.
 must give way to principle, 125.
 See Conveyancers, Merchants, Pleadors.
- PRECEDENT, value of the principle of following, 25.
 binding effect of, 25, 32.
 danger in not following, 31, 32.
 that tends to lengthen proceedings, is bad, 51.
 force of, in equity, 58.
 difference between making and following, 59.
 cause to stand over to search for, 385.
 a decided case is a, 197.
 the law is a codeless myriad of, 197 *note*.

PRECEDENT—*Continued.*

- no precise rule can be laid down for authority of, 198.
- conflict of, 327.
- respect for, can alone insure certainty in the law, 200.
- sometimes difficult of application, 200, 327.
- always to defer to, would be to assert the infallibility of the judges, 201.
- reason for adherence to, that transactions have been based upon, 202, 213, 231.
- adherence to one, 196.
- adherence to two or more, 212–228.
- strong reasons should exist for overruling several, 213.
- departure from, 215.
- departure from, incurs high degree of responsibility, 225.
- inconvenience to depart from, 231.
- almost the sole ground of argument in questions of law, 248.
- confined to exactly similar cases, 250.
- illustrate principles, 271.
- courts must make, when a new case occurs, 274.

PRESTON on Conveyancing, remarks upon, 164.

PRINCIPLE of Law, a rule is, 87.

- law is dependent upon, 197.
- is a common ground of decision, 87.
- when ascertained is authoritative upon courts, 87.
- practice to yield to, 125.
- of English law, borrowed from the civil law, 138.
- how to use, 31.
- to be applied to new cases, 270.
- precedents illustrate, 271.
- new cases decided on, 273.
- extracting from decisions, 329.
- rules in conflict with, not to be extended, 221.
- if erroneous, yet when established, courts hesitate to overrule, 237.
- must be resorted to when decisions are conflicting, 245, 328.

PRIVATE Interpretation, danger of, 31.

PRIVATE—*Continued.*

Opinion, ought not to prevail against established rules,
235.

PROCESS, which a judge may use to construct a judgment, 23.

PROPOSITIONS, although stated generally, may not admit of
universal application, 97, 99.

PUBLIC POLICY, 110, 410 *note*.

RE-ARGUMENT, causing a reversal of the former judgment, 359.
when it will be ordered, 359, 383.

REASON, the life of the law, 30, 32, 35.

of a decision, not to be abstracted from the facts, 98,
251.

want of, not a ground for subverting a rule, 249.

See Legal Reason.

RECORD, each decided case has a, 174.

of a case not reported, 174.

of a case, is the judgment, 175.

may or may not contain reasons for the decision, 175.

the best test of the correctness of a report, 176.

REGISTER, the remarks upon, 158.

See Practical Register.

REHEARING, where judges differ in opinion, 49.

RELIGION, a material of a judgment, 33.

object of law to uphold, 35.

RELIGIOUS CORPORATIONS, English Law as to, not in force
in New York, 37.

REPEAL of *Statute*, by judicial determination, 19.

REPORTED CASES, materials of a judgment, 34.

learning the whole truth of, 347.

REPORTERS appointed, 177.

judicial estimates of, 179.

REPORTS, foundation of jurisprudence, 47.

extant from reign of Edward II, 177.

definition of, 174, 176.

the records, the best test of the correctness of, 176.

may be corrected by manuscript notes, 177.

judicial complaints against, 178.

not all of equal merit, 178.

goodness of, a matter of much importance, 179.

English, under council of law reporting, 193.

REPORTS—*Continued.*

American, 193.

number of volumes of, 195.

New York, 193.

RES ADJUDICATA, decision on non-enumerated motion is not, 226.

decision on *habeas corpus* is not, 227.

RETROSPECTIVE LAWS, 424.

REVEALED LAW of God, a material of judgment, 33.

Law of England founded on, 35.

See Law of God.

REVIEWS quoted in the courts, 173.

RICHARDS, very learned, 304.

RIVERS. *See* Navigable Rivers.

ROLLE'S Reports, remarks upon, 187.

Abridgment, remarks upon, 190.

ROMAN LAW, the body of, 133.

ROPER on Husband and Wife, remarks upon, 152.

RULES, acknowledged as authority, 72.

origin of, 72.

definition of, 72.

varieties of, 73.

when they cease to be authority, 73.

are varied by circumstances, 74.

are to be applied according to circumstances, 84.

although erroneous, should be endured until corrected by a higher tribunal, 85.

sometimes difficult to ascertain what they are, and their application, 86.

are principles of law, 87.

inconvenience of, does not show them to be unjust, 116.

courts are judges of their own, 126.

difficulty of laying down accurately, 215.

Settled, to be adhered to, 83, 86, 230, 232, 249.*Established*, dangerous to alter, 231.when unreasonable, judges should be astute to discover reasonable distinctions to, 249 *note*.

insufficient reason for not ground for overturning, 249.

SALE. *See* Market Overt.

SATISFACTIONS, double, 379.

SAUNDERS' Reports, remarks upon, 187.

See Williams.

- SECOND TRIAL, reason for, frequent occurrence of, 27, 28.
- SHEPPARD'S TOUCHSTONE, remarks upon, 159.
- SOLICITOR. *See* Attorney.
- STARE DECISIS, principle of, prevents courts from legislating, 22.
rule of, one of the most sacred in the law, 234.
rule of, should be adhered to, 197, 231, 235.
reasons for adhering to, 235.
is a salutary doctrine, 202.
danger of departing from rule of, 413, 423.
- STATE DECISION, authority of, 295, 296.
- STATUTES, repeal of, by judicial decision, 19.
to correct effect of judgments, 20.
how far controlled by common law, common right, and reason, 38.
customs and usages to be considered in construing, 39.
forms giving a construction to, 42.
rules for construction of, 46.
works on the construction of, 46.
inconvenience not of great weight against provisions of, 116.
difficulties in the interpretation of, 344.
- STORY, is authority in Westminster Hall, 169.
convinced court of an error of Lord Hale, 352.
his mode of preparing his judgments, 388.
- STRANGE'S Reports, remarks upon, 187.
- SUGDEN on Powers, remarks upon, 164.
- SUPREME COURT of the United States, authority of its decisions, 295.
- TALBOT, Lord, a great real property lawyer, 301, 305.
- TENANCY. *See* Fixtures, Joint tenancy.
- TENTERDEN, eminently learned, 304.
- TERMES de la Ley, remarks upon, 164.
- TEXT-BOOKS, on ecclesiastical and canon law, 146.
on the law of nations, 148.
on the civil law, 141.
on construction of statutes, deeds, and wills, 46.
certain, are authority in law, 150.
certain rules of law only to be found in, 151.
augmented authority of, when written by judges, 152, 166.

TEXT-BOOKS—*Continued.*

- authority of, during the authors' lives, 166.
- contain the result of the authorities, not the opinion of the authors, 167.
- distinction between those that are, and those that are not authority, 167.
- English inferior to American, 169.
- correcting errors of the courts, 169.
- sometimes mislead the courts, 169, 351.
- may increase authority of a decision, 315.

THURLOW, Lord, authority of his decisions, 310.

a great judge, 303.

TIDD'S PRACTICE, remarks upon, 165.

TIME to Consider of Judgment, 384, 391.

See Justice, Postponement.

TRADE. *See* Fixtures, Merchants.

TREATIES, materials of a judgment, 33.

TREVOR, Lord, his constructions, 307.

TRIAL, *See* Second Trial.

TWISDEN, an able lawyer, 300.

UNCERTAINTY, in the law, disadvantages of, 199.

of law suits, 26, 29.

in administering justice, how it arises, 399.

See Certainty.

UNIFORM IDEA, as a ground for decision, 40.

UNITED STATES, materials of judgments in, 33.

English law imported into, 36.

how far English laws and customs adopted in, 37, 38.

See Federal Courts.

UNREPORTED CASE, authority of, 29, 318.

record of, as authority, 174.

See Manuscript Note.

USAGE, to be considered in construing statutes, 39, 122.

may overturn *dicta*, 122.

of merchants, great respect paid to, 129, 348.

See Change, Practice.

VALUE, *See* Authorities, *Dicta*.

VINER'S Abridgment, remarks upon, 191.

- WAGER, how Lord Holt disposed of action on a, 347.
refusing to try action on, 383.
- WEBSTER'S Dictionary, extensively quoted in courts, 173.
- WEST'S Symboleography, remarks upon, 160.
- WILLES, no mean authority, 303.
- WILLIAMS' Notes to Saunders' Reports, remarks upon, 165.
Reports, remarks upon, 187.
- WILLS, difficulties in interpretation of, 323, 338.
of Lawyers, often litigated, 343.
- WINCH'S Reports, remarks upon, 188.
- WORDS, *See* Dictionaries, Glossaries, Interpretation.
- WRIGHT, J., one of the strictest law judges, 307.
- WRITER, *See* Law Writer.
- WYNDHAM, of great authority, 300.
-
- YEAR BOOKS, whence name derived, 177.
See Reports.

